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A late statute of Maryland requires that "all dairymen or herdsmen or private individuals supplying milk to cities, towns, or villages shall register their herds or cattle with the live stock sanitary board," and section 20 makes it the duty of such board "to have inspected at least annually, without notice to the owner or those in charge of any dairy, or the parties supplying milk as named in section 19 of this article, the premises wherein cows are kept, and if such premises are found in an unsanitary condition the said board may prohibit the sale and shipment of milk from such premises until such time as such premises shall conform to the following sanitary rules," and then follows a series of rules for the regulation and drainage of places used for keeping cows for dairy purposes, and the feeding and watering of such cows. The Court of Appeals of Maryland has recently considered the validity of this act in the case of State v. Broadbelt, holding that it is a legitimate exercise of the police power of the State, and does not deprive any person of his liberty or property without due process of law as guaranteed by the constitution of the United States and of Maryland. It was also earnestly insisted by the opponents of the act that it deprived a person of the equal protection of the law guaranteed by the fourteenth amendment, for the reason that the act limited its application to dairymen or herdsmen or private individuals supplying milk to "cities, towns or villages," thus creating a purely arbitrary, unjust, or unreasonable scheme of classification. But the court adjudged otherwise, adopting the view of Judge Cooley on the subject, which has been abundantly supported by the adjudicated cases to the effect that "the guaranty of equal protection is not to be understood, however, as requiring that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds; it cannot be a mere arbitrary selection."

A recent issue of the *Chicago Legal News* contains an interesting decision by the Circuit Court of Cook County in the case of the Union Pressed Brick Co. v. Chicago Hydraulic Pressed Brick Co., awarding a temporary injunction against the Masons' & Builders' Association, and four conspiring brick dealers, enjoining them from carrying out an agreement between them which provided that all pressed or paving brick in Chicago should be purchased by members of said association from no other person or firm save and except the said four conspiring brick dealers, and awarding a further mandatory injunction commanding said firms of the Masons' & Builders' Association to rescind the rules and regulations which had been passed to enforce said agreement, and requiring said association to notify the members of said association that said rules are rescinded and annulled; the court holding, upon demurrer to the bill, that the arrangement set out in the bill of complaint constituted a criminal offense under the anti trust law of Illinois, and that its enforcement worked a financial injury to the complainant irreparable in its nature, and that while a court of equity, as a general principle, will not enjoin the commission of a crime, yet that where the commission of such crime will work irreparable injury to the property interests of a complainant, a court of equity may give the complainant relief by injunction against the proposed action of the conspirators which will produce the irreparable injury, although in effect the result is an injunction against the commission of a criminal offense. The contention of the defendants was forcefully presented that courts of equity will not enjoin the commission of a crime, but the court, citing full authorities, shows that where parties are contemplating an action criminal in itself, and which in addition thereto will work irreparable injury to a complainant, the court, while it will not enjoin a proposed crime *as crime*, yet has full authority to enjoin the action to prevent the irreparable financial injury to property, and that a complainant under such circumstances is entitled to the protection of a court of equity by injunction.

NOTES OF IMPORTANT DECISIONS.

EXECUTION—WRONGFUL LEVY—MEASURE OF DAMAGES.—In Summers v. Heard, 51 S. W. Rep. 1057, it was decided by the Supreme Court of Arkansas, that the owner of a stock of druggist's goods cannot, on the wrongful seizure and conversion of the goods, recover for their use as for loss of profits, in the absence of proof that they could not have been readily replaced so as to prevent any stoppage of business; that, in an action for wrongfully levying an execution on a stock of goods, special damages for the destruction of plaintiff's business through the levy cannot be recovered, unless the amount thereof be alleged and proved. It was further held that to show that a person on whose stock in trade an execution was wrongfully levied had sustained special damages because his business had been destroyed through the levy, evidence that he was doing a good and improving business, that others in the same line were doing well, and that there was no reason why he could not do well also, is inadmissible, being too vague and uncertain. The court said in part: "This was an action for damages caused by the seizure and sale of a stock of goods claimed by plaintiff, the facts of which are fully stated in the opinion of the court (50 S. W. Rep. 78) by Mr. Justice Battle. It is insisted, on the motion to rehear, that the court erred in giving to the jury the following instruction in reference to the measure of damages: 'If you find for the plaintiff, you will assess the actual damages at the value of the property at the time of the seizure, with six per cent. interest thereon from the seizure up to this date, and such further sum as you will find, from the proof, the plaintiff has sustained from being deprived of his business.' As a general rule, the measure of damages in an action of this kind is the value of the property at the time and place of the conversion, with interest thereon from that time. Kelly v. McDonald, 39 Ark. 387; Jones v. Horn, 51 Ark. 19, 9 S. W. Rep. 309. There is nothing shown here to take this case out of the general rule. The goods taken and converted were such as are generally kept for sale by druggists, and there is nothing in the evidence to show that they could not have been readily replaced by the purchase of other like goods in the market, thus preventing any stoppage of business. Under the facts of this case plaintiffs cannot, in addition to the value of the goods and interest, recover for use of goods as for loss of profits. Anderson v. Sloane, 72 Wis. 566, 40 N. W. Rep. 214.

"It is said on part of appellees that the complaint alleged that the seizure and sale of the stock of goods destroyed plaintiff's business, and that this allegation, not being denied, must be taken as true. If we concede this statement to be correct, still, before any recovery could be had for loss of business, the amount of such special damages should be alleged, and shown by evidence, with some degree of certainty. We have nothing of the kind here. The value of the business said to be destroyed is not alleged, nor is there in the transcript any competent evidence of such value. There is in the complaint only the general allegation that the business was established and profitable, and that it was destroyed by the levy and the sale of the stock of goods. On the trial the plaintiff was allowed, over the objection of defendants, to state generally that he was doing a good business, which was improving, that others were doing well in the drug business, and that he did not see why he could not do well also. This evidence, even if there were no other objection to it, was too vague and indefinite, and should have been excluded. But the circuit judge refused to exclude it, and, by the instruction above noticed, told the jury that, in addition to the value of his goods and interest, they should allow the plaintiff such further sums as the proof showed that he had sustained by being deprived of his business. Even if it were proper to allow damages for stoppage of business in this case, this instruction would still be erroneous; for it does not limit the damage for such loss to the time necessarily required for replacing the goods seized by defendants, but leaves the jury free to assess damages for loss of profits for any length of time they might choose to fix upon, and was, when taken in connection with the evidence above noticed, calculated to mislead the jury to the prejudice of appellant. The evidence and instruction as to loss of business were both, we think, improper; for, as before stated, in the absence of any allegation or proof as to special damages, and where no grounds for exemplary damages are shown, the recovery in cases of this kind is limited to the value of the goods converted, with interest from the time of conversion. Kelly v. McDonald, 39 Ark. 387; Jones v. Horn, 51 Ark. 19, 9 S. W. Rep. 309; Ingram v. Rankin, 47 Wis. 406, 2 N. W. Rep. 755; Anderson v. Sloane, 72 Wis. 566, 40 N. W. Rep. 214."

RELEASE AND DISCHARGE—COMPROMISE—MISTAKE OF FACT.—In Kowalke v. Milwaukee Electric Ry. & Light Co., 79 N. W. Rep. 762, decided by the Supreme Court of Wisconsin, it was held that where a woman is injured in jumping from a car, the fact that she is pregnant at the time is merely a condition bearing on the probable effect of the injury; and, accordingly, a mutual mistake as to that fact is not sufficient to set aside a compromise of her claim for damages, she having had a miscarriage, after the release was executed, as a result of the injury.

It appeared that an intelligent woman of experience in maternity, had passed by about a week the proper period of her menstruation when she was injured in jumping from a car. She stated to the physicians who examined her injuries that she was sure, from certain symptoms, that she was not pregnant, and refused to submit to an examination in regard to that question; and, from all the doctors could learn, they were not sure

that she was in that condition. A compromise of her claim for damages was then made, and shortly afterwards she had a miscarriage. It was held that there was no such mistake in regard to her pregnancy as to set aside the release; the parties being conscious of their ignorance, and electing to proceed without full investigation. The court said in part:

"Applying the definitions and rules of law above set forth, with their qualifications, to the facts of this case, it is clearly apparent that if there was a mistake, in the sense in which that word is used in the law, the fact as to which such mistake existed was not an intrinsic one—it was not of the subject-matter of the contract. There was no mistake or misunderstanding as to the acts of the defendant, nor as to the injuries which the plaintiff had received. The effect of those injuries was, of course, problematical and conjectural. That very uncertainty entered into the compromise made, and was the consideration of a certain sum on one side, and the surrender of any larger sum on the other. The elements of the contract of settlement were: First, whether defendant was liable; and, secondly, what amount, in view of all the contingencies, should be paid and received in satisfaction of such liability, and the question of the plaintiff's condition (whether pregnant or not) was merely a collateral question. It was no part of the injury caused by defendant, nor anything for which damages should be paid. At most, it was but one of the surrounding conditions which might or might not increase the effect of the injuries. It is probably true, in the great majority of personal injury cases, that the effect which the injuries received may have, as to time of disability, *quantum* of suffering, and the like, may be modified by the physical or mental condition of the injured party. For example, a predisposition to rheumatism would be a condition likely to enhance the subsequent effects of an injury, especially a dislocation or other injury to a joint. A disturbed condition of the system might prevent the reuniting of a broken bone, otherwise practically certain. A predisposition to nervous troubles might vastly multiply the effects of a slight spinal injury. So that if the mere ignorance of such surrounding conditions can suffice to render ineffective a settlement, because after events indicate that the amount paid is inadequate, few compromises of the damages from personal injury could be relied on. Compromise is highly favored by the law, and any rule or doctrine by which the fair meeting of the minds of the parties to that end, in the great majority of cases which arise in human affairs, must fail to be permanent or effectual to settle their rights, is contrary to the whole spirit of the law, and should not be adopted. The question in each such case is, did the minds of the parties meet upon the understanding of the payment and acceptance of something in full settlement of defendant's liability? If they did, without fraud or unfair conduct on either side, the contract must stand, although subsequent events may show that either party made a bad bargain, because of a wrong estimate of the damages which would accrue. Seeley v. Traction Co., 179 Pa. St. 334, 338, 36 Atl. Rep. 229; Homuth v. Railway Co., 129 Mo. 629, 31 S. W. Rep. 903; Klauber v. Wright, 52 Wis. 303, 314, 8 N. W. Rep. 893. In the case at bar there can be no question but that the agreement reached was for full settlement of all defendant's liability for damages resulting from the accident. The written agreement unambiguously asserts such intention, and there is no claim that plaintiff did not so understand it. She might well enter on such compromise, for every advantage of knowledge as to the injuries received, and as to their probable effect, was with her. She had the benefit of her own observation and the counsel of her customary physician, while defendant had but the opportunity of observing a single brief examination of her person, and that much less complete than was requested, in which its physician was necessarily subject to be deceived by simulated symptoms or exaggerated statements. In addition to all of which, the settlement cast upon the defendant a share of the contingencies of an underestimate of damages, while she assumed none in case an overestimate had been made. All charges for medical attendance by reason of her injuries were assumed by defendant, and it might with some reason claim that it should not pay those due to the miscarriage, since plaintiff gave the most vehement assurances against any such event. But both parties have treated this obligation as one to be performed by defendant, notwithstanding the unexpected enhancement thereof. On the other hand, no promptitude of recovery or overestimate of the injury was, by the agreement, to cause a return of any of the consideration paid.

"It may be noted here that plaintiff nowhere suggests that she would not have made this settlement had she been aware of her pregnancy; and, under this branch of the law of mistake, it is laid down that it must clearly appear that the contract would not have been made had the fact been known. This is a material consideration. Enhancement of her damage was by no means certain to result from the fact of pregnancy. Indeed, the only evidence on the subject was against the probability of any such effect. We cannot say that she would not have been willing to accept this settlement and assume the contingency even had she known the fact of her condition. And, even if the fact were one intrinsic to the transaction, still it is essential to the extreme remedy of rescission of a deliberate contract that plaintiff prove clearly that she would not have executed had she known the truth. Klauber v. Wright, *supra*; Grymes v. Sanders, 93 U. S. 55.

"If, however, the fact of pregnancy had been one intrinsic to the contract, the question remains whether such mistake was made with reference thereto as avoids that contract. The court below find that a mistake existed as to that fact. So far

as this is a finding of fact, we shall accept it as conclusive in the light of the evidence; but whether it is such a mistake as justifies rescission of a deliberately executed agreement is a question of law, and present before us for decision. We have already pointed out the distinction between the 'unconscious ignorance' required to accomplish this result and the mental state of consciousness of ignorance whether the fact exists or not—where, as Dixon, C. J., phrases it, her attention being called to the subject, she waived any investigation of it, and elected to proceed without inquiry into it. It seems clear that the plaintiff was—indeed, that both parties were—in the latter mental condition. * * * In a case of doubt like this, if the doubtful fact is material, parties may compromise and include the uncertainty among those covered by the settlement; they may refuse to settle until the uncertainty is removed, or they may settle everything else and expressly omit therefrom the specified contingency. If they go on and make settlement in terms complete, they will be presumed to have intended the apparent effect of their acts. Any other presumption would be contrary to the truth in the great majority of instances and defeat the real intention of the parties, and we have no doubt it would do so here. It seems to us that both parties had in mind the possibility of pregnancy, and yet that both intended what they said by their written agreement, namely, to pay and accept in compromise and discharge of all defendant's liability a present sum of money and payment for any medical attendance rendered necessary by the injuries. The defendant has performed that agreement on its part, and plaintiff must be held to abide it on hers."

CORPORATIONS — FOREIGN CORPORATIONS—LIABILITY OF STOCKHOLDERS.—In Stoddard v. Lunn, 53 N. E. Rep. 1108, it is held by the Court of Appeals of New York, that a statute of Illinois making stockholders of corporations liable for debts of the corporation to the extent of the amount unpaid on their stock, and authorizing such liability to be recovered by suit brought against any one or more stockholders at the same time, prescribes an exclusive remedy, available only in Illinois, which cannot be enforced in New York against a resident of that State owing a balance on a subscription to the stock of an Illinois corporation, and that the assignee for the benefit of creditors of an Illinois corporation, authorized by the laws of that State to maintain any suit which the corporation could have maintained, may maintain an action in New York to recover a balance due by a resident of New York on a subscription to the stock of the corporation, though such suit is expressly authorized by an Illinois statute, making the holders of unpaid corporate stock liable for their *pro rata* share of corporate debts, to the extent of the unpaid portion of their stock, as, the liability on a stock subscription being wholly contractual, the remedy exists independent of the statute, which has extraterritorial force. The court says in the course of a long opinion: "The sole question to be determined by us at this time is whether this action can be maintained, and we are not concerned with the practical difficulties that plaintiff may encounter in establishing to the satisfaction of the trial court the just *pro rata* share of the defendant stockholders in the payment of the indebtedness of this insolvent corporation. We are of opinion that this action is clearly maintainable, upon principle and on authority. A subscription to the stock of a corporation creates a debt enforceable, at law or in equity, by the corporation or its legal representative. Sagory v. Dubois, 3 Sandf. Ch. 466; Mann v. Pentz, 2 Sandf. Ch. 257; Herkimer v. Small, 2 Hill, 127; Railroad Co. v. McChesney, 21 Wend. 296; Mann v. Cooke, 20 Conn. 178; Railroad Co. v. Kennedy, 12 Conn. 499; Railroad Co. v. Boorman, 12 Conn. 530; Ward v. Manufacturing Co., 16 Conn. 593. The receivers and assignees of individuals and corporations domiciled in another State are permitted, under interstate comity, to enforce the contracts of such individuals and corporations in the State of the debtor's residence. In Dayton v. Borst, 31 N. Y. 435, this court held the capital stock of a New Jersey bank a trust fund for the security of its creditors, and permitted the receiver of the bank, appointed in New Jersey, to recover of a New York defendant the amount remaining unpaid of his subscription to the capital stock. In Peterson v. Bank, 32 N. Y. 21, it was held that the assignee of a foreign executor may maintain an action in the courts of this State upon a chose transferred to the assignee by the executor; also that the title of the foreign executor to the assets of the State is perfect, though conferred by the law of the domicile. Judge Denio says, at page 43: 'Foreign corporations may become parties to contracts in this State, and may sue or be sued in our courts on contracts made here or within the jurisdiction which created them.' In Toronto General Trust Co. v. Chicago, B. & Q. R. Co., 123 N. Y. 37, 25 N. E. Rep. 198, it was held that a foreign testamentary trustee, having title to the trust estate, may recover any portion thereof that has been converted, or damages for the conversion, without having the will admitted to probate here. Judge Earl pointed out that the trustee stood on his legal title, and his position was to be distinguished from that of foreign executors or administrators, who cannot sue here for reasons of public policy, as the courts will not aid them in the removal of the assets from this State, to the possible prejudice of domestic creditors. In the very recent case of Mabon v. Electric Co., 156 N. Y. 196, 50 N. E. Rep. 805, this court held, Judge Vann writing the opinion, that while a foreign receiver of a foreign corporation cannot maintain an action in this State against the corporation as sole defendant, for the sole purpose of procuring the appointment in this State of an ancillary receiver, notes and accounts may be collected by the usual proceed-

ings in our courts, which regard a foreign receiver as representing the original owner, and open their doors to him as they do to a domestic receiver. The learned judge cites, at page 201, Barth v. Backus, 140 N. Y. 230, 35 N. E. Rep. 425, Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. Rep. 932, and many other cases, sustaining the point now considered. In Mann v. Cooke, 20 Conn. 178, a New York receiver of an insolvent corporation was permitted to sue in Connecticut for balance due on a stock subscription. In Cooke v. Town of Orange, 48 Conn. 401, the receiver of an insolvent New Jersey corporation was allowed to complete the contract of a manufacturing corporation he represented with the town defendant, and afterwards to sue for work and materials in the courts of Connecticut; also to attack the garnishee process sued out by the creditors of the local defendant. Pond v. Cooke, 45 Conn. 126; Blake Crusher Co. v. Town of New Haven, 46 Conn. 473. The case at bar is not to be distinguished in principle from the authorities cited. The plaintiff, as the general assignee for the benefit of creditors of an insolvent corporation, is vested with the legal title of all its property, and the power to reduce its assets to possession, and his title is perfect, though conferred by the law of the domicile. Peterson v. Chemical Bank, 32 N. Y. 21. If, as in Dayton v. Borst, 31 N. Y. 435, the receiver of a bank in New Jersey was allowed to come into our court and recover the amount remaining unpaid of a stock subscription, why should not this plaintiff, as a general assignee, be permitted to institute a similar action? Can it be said that there is any legal distinction to be drawn between a receiver created by the order of a foreign court and a general assignee created by a foreign legislature? The plaintiff does not come here seeking to remove assets from this State to the possible prejudice of domestic creditors, but asks that he be permitted to enforce against our own citizens the performance of contracts into which they have entered in another jurisdiction. Public policy and State comity both require that this request should be granted."

EMPLOYMENT—EMPLOYEE—EMPLOYER.

I. *Employment.*—The word employment, as defined by authority, means an occupation, business, industry, engagement, vocation, calling or profession.[1] In the case of Partridge v. Mallandaine,[2] it is held that the word does not necessarily mean "a case in which a person is set to work for money by another. One may employ himself in a manner to earn money so as to be said to carry on an employment. A book-maker, attending horse racing, and betting upon them, is an employment within the meaning of an income tax act. Employment or being employed means that which occupies the time, attention and labor of men for the purpose of a livelihood or profit. In order to constitute the sale of liquor one's business or employment under a license law, it is necessary that more than one sale should be made.[3] Professional employment can only relate to some of the occupations universally classed as professions, the general duties and character of which courts are expected to understand judicially. In Rennock v. Fuller,[4] it is held that one in the real estate business is not engaged in a professional employment. The word employ, when used as a noun, involves the relationship of master and servant. But a contractor who is his own master, and employs men who are under his direction and control, is not "in the employ" of his contractee.[5] The word "employ," when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for compensation, and has but one meaning when used in the ordinary affairs and business of life. In the case of McClusky v. Cromwell,[6] it is held that laborers employed by a subcontractor were not laborers employed by the chief contractor himself, within the meaning of a bond to pay the compensation of such laborers. In the case of Emmens v. Elderton,[7] Crompton, J., says: "The words 'retain' and 'employ,' as used in the present case, are a mere amplification of the preceding contract of hiring and service. These words are used in the precedents continually as meaning a hiring, and do not necessarily imply that the master is bound to supply the servant with any particular work whilst the relations subsist." In this case a contract between a corporation and an attorney, by which he was to accept a salary in lieu of rendering an annual bill of costs, and advise and act for the company on all occasions in all matters connected therewith, was

[1] State v. Canton, 43 Mo. 51.
[2] 56 L. J. R. Q. B. D. 251.
[3] More v. State, 16 Ala. 411; Harris v. State, 50 Ala. 127; United States v. Jackson, 1 Hughes C. C. 531; Bishop on Staty. Cr. sec. 1016.
[4] 41 Mich. 153.
[5] State v. Emmerson, 72 Me. 455.
[6] 11 N. Y. 593.
[7] H. L. Cas. 627.

held sufficient to support an allegation that the corporation had promised to retain and employ him as attorney. In the Exchequer Chamber, Parke, B., said: "'Does it also imply a promise to employ? It depends on the meaning of the word 'employ.' If it means that the company shall be bound to supply him with business as an attorney and solicitor at all events, or to require his advice or use his services as attorney or solicitor whenever they have occasion for the advice or services of an attorney or solicitor, we think it clear that there is no such promise on their part. To hold that there was a promise to the former effect would be to hold that the company must be bound to incur litigation as well as create occasions for legal advice. * * * But if the word 'employ' means only 'to engage in his service'—one of the meanings of that term—then there appears to us to be a promise to that effect. Many cases of employment may be suggested, in different capacities, when the use of the actual service is optional or conditional, and yet the employment may properly be said to take place or continue."[8] "Employed" is defined, in an act to prevent the employing of children, to mean "occupied in any handicraft, whether for wages or not, under a master or servant."[9] To be employed in anything means not only the act of doing it, but also to be engaged to do it, or to be under contract to do it.[10] A more restricted or contingent meaning was put upon the word in School District v. Dellman,[11] where, under an act providing that no one should be employed as a teacher unless he had first obtained the license required by law, it was held that the employment began, not at the time of the contract, but at the time of entering upon the performance of the duties of the position. If the license was obtained in the interval the contract or employment was valid. One may be employed about his own business. In a statutory definition of vagrancy, one "employed as a beer-carrier," may include the proprietor of a saloon, as well as his employees.[12] The meaning of employment must be construed in reference to a particular thing or class. Thus, "persons who are employed, or about to engage, in the cultivation of the soil," construed in reference to an act providing for the creation of agricultural liens by such, has reference only to the cultivator of the soil on his own account; that is, the proprietor, either as landowner or tenant, and as such owner of the crop to be made. The phrase does not include a mere laborer for wages, engaged as a farmhand in cultivating the soil.[13]

II. *Employee.*—Webster defines the word "employee" as one who is employed, and this definition is adopted in the case of Ritter v. State,[14] and Stone v. United States.[15] One who renders labor or service to another is an employee. In the case of Watson v. Watson Mfg. Co.,[16] it is held that a drayman who renders his entire service to a manufacturing company is an employee in its regular employ, within the meaning of a statute giving preference to wages claims. An "employee" is one engaged in the service of another. He may be a skilled laborer, a scientist or professional man, as well as a servill or unskilled manual laborer. The word "employee" does not include an officer of a corporation. An act regulating the foreclosure of railroads provided that the purchaser should pay "all sums due or owing to any servant or employee;" these terms were, in Wells v. S. M. Ry. Co.,[17] held not to include the secretary of the company, but only "operatives of the grade of servants who have not a different, proper and distinctive appellation, such as officers and agents of the company." The officers of a corporation or company are its agents, and, it may be said, are the official masters who direct and control the servants and employees. The former are appointed and elected, and are trustees; the latter are hired, and are the subordinates of the former. The president of a railroad company is not an employee, within the meaning of a statutory provision excepting wages from garnishment.[18] "The word 'employee' is a word recently adopted into our language from the French, and applies equally to a person within or without the office, whether he be a servant or

[8] Elderton v. Emmens, 6 C. B. 160.
[9] Bladon v. Parrott, L. R. 8 Q. B. 718.
[10] United States v. Morris, 14 Pet. (U. S.) 464.
[11] 22 Ohio St. 194.
[12] State v. Canton, 43 Mo. 48.
[13] Carpenter v. Strickland, 20 S. Car. 1.
[14] 111 Ind. 324.
[15] 3 Ct. of Clms. Repts. 360.
[16] 30 N. J. Eq. 588.
[17] 1 McCrary C. C. 18, 1 Fed. Rep. 27.
[18] S. & N. A. R. R. Co. v. Falkner, 49 Ala. 115.

a clerk. One engaged in the performance of the proper duties of an office is an 'employee in the office,' whether his particular duties are carried on within or without the walls of the building in which the chief officer generally transacts his business. The word 'employee' signifies anyone in place or having charge, or using a function, as well as one in office." (Peck, J., in Stone v. United States, 3 Ct. of Clms. Repts. 260.) An order authorizing a receiver of a railroad to pay debts "owing to the laborers and employees" of the company "for labor and services actually done in connection with the company's lines," was held to include a claim for services as counsel; that is, he was employed by and rendered important services for them. The word employee is of more comprehensive signification than "laborers and operatives." In the case of Gurney v. A. & G. W. Ry. Co.,[19] it was said that "the term 'employee' is the correlative of 'employer,' and neither term has either technically or in general use a restricted meaning by which any particular employment or service is indicated. The terms are as applicable to attorney and client, physician and patient, as to master and servant, a farmer and day laborer, or a master mechanic and his workmen."

III. *Employer.*—One who engages or contracts with another for his service, or one who employs an agent or substitute in the transaction of his business, or is empowered to commission and intrust others with the management of his affairs, is an employer. The word "employer" is equivalent to the word "master," and the term "employer and employee" implies the relationship of "master and servant."[20]

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[19] 58 N. Y. 358.
[20] State v. Emmerson, 72 Me. 455.

INSURANCE — ADDITIONAL INSURANCE—CONSENT OF INSURER — FORFEITURE—WAIVER—NOTICE—AUTHORITY OF AGENT—BURDEN OF PROOF — RETENTION OF PREMIUM.

ALABAMA STATE MUT. ASSUR. CO. v. LONG CLOTHING & SHOE CO.

Supreme Court of Alabama, June 30, 1899.

1. Waiver of a provision of a policy in favor of the insurer may be shown by parol, though the policy stipulates that such provision shall be waived only on the written consent of the secretary.

2. Where an insurance policy stipulates that the procuring of additional insurance on the property covered by the policy without its consent shall be a ground for a forfeiture thereof, the failure of the company to assert a forfeiture within a reasonable time after it has knowledge of the procuring of such additional insurance is a waiver of the forfeiture.

3. An insurance agent who is only authorized to solicit and take applications for insurance, and deliver the policy and receive the premium, has no authority to waive a condition of a policy providing that it shall be void in case insured procures additional insurance without its consent; nor is notice thereof to him notice to the company.

4. In an action on a policy, when the defense is a forfeiture of the policy on the ground that insured procured additional insurance without the insurer's consent, contrary to the provisions of the policy, if a waiver of the provision by reason of notice to the local agent is relied on, the burden of showing that he has authority to receive it rests on insured.

5. A retention of the premium, and inspection of a loss by insurer, without expense or inconvenience to insured, after knowledge of the procurement by insured of additional insurance without its consent, contrary to the provisions of the policy, does not constitute a waiver of the forfeiture occasioned by such procurement.

The defendant pleaded the general issue, and by the second special plea it set up the violation of a contract of insurance, in that, contrary to the stipulations of said contract, the plaintiff obtained additional insurance upon the goods alleged to have been damaged, without giving notice to, and obtaining the written consent of, the defendant. To this second special plea the plaintiff filed nine replications. Demurrers were sustained to the sixth and eighth, and it is therefore unnecessary to set them out at length. The first replication averred that the allegations contained in said second plea were not true. The remaining replications were as follows: "Second. Before such loss occurred, notice of such additional insurance was given to the defendant, and no objection was made thereto by said defendant prior to such loss; and the defendant had a reasonable time after such notice, and before such loss, within which to make such objection. Third. Before such loss, notice of such additional insurance was given the defendant by the plaintiff, and the said defendant made no objection or dissent thereto, and did not cancel the said policy, and did not return the unearned premium thereof; and the defendant had a reasonable time in which to make such objection and dissent, to cancel said policy and return said unearned premium, after such notice was given, and before such loss occurred. Fourth. Before such loss occurred, the defendant, with notice of such additional insurance, waived the grounds set up in its second plea, by failing to make objection within a reasonable time to such additional insurance; and the defendant had a

reasonable time in which to make such objection after such notice had, and before such loss occurred. Fifth. Before such loss occurred, the defendant, with notice of such additional insurance, waived the grounds set up in its second plea, by failing to make objection to, or to dissent from, such additional insurance, and by failing to cancel said policy and to repay to plaintiff the unearned premium thereon; and the defendant had reasonable time within which to make such objection and dissent, cancellation and repayment, after notice had, and before such loss occurred." "Seventh. Said additional insurance was effected by M. G. McCargo, then and there the agent of the defendant; and the defendant did not express disapproval as to such additional insurance, and made no objection thereto." "Ninth. Heretofore, on, to-wit, the 12th day of May, 1897, one M. G. McCargo, with an office in the city of Talladega, Talladega county, Alabama, was engaged in business as a general insurance agent. The said defendant, knowing the said McCargo to be engaged in such business, selected him as its agent in the said city of Talladega to transact business for it, and the said McCargo from a time anterior to the said 12th day of May, 1897, until after, to-wit, the 28th day of Septemper, 1897, continuously, continued to act, and was held out to the general public by the said defendant, as its agent in the said city of Talladega; and as such agent the said McCargo received from the plaintiff a premium of, to-wit, $10 (ten dollars), and delivered to it the policy sued on in this case. Afterwards, on, to-wit, the 2d day of July, 1897, the plaintiff applied to the said McCargo, doing such general insurance business, for additional insurance, and the said McCargo then and there agreed with the plaintiff to effect for it such additional insurance, whereupon, said McCargo, who still continued as aforesaid to be the agent of the said defendant, and who was also at the same time the agent of, to-wit, the Southern Mutual Fire Insurance Company of Alabama, as such agent agreed and contracted with the plaintiff for the additional insurance in the sum of, to-wit, one thousand dollars ($1,000), and thereupon issued to the plaintiff a policy on the said property in the said Southern Fire Insurance Company of Alabama for the said additional amount of one thousand dollars; and in the said policy to the said last-named company he, said McCargo, inserted a clause in words and figures as follows, to-wit: '$1,000 additional insurance permitted, warranted to be concurrent herewith.' And by the same he intended to refer and did refer to the policy of insurance sued on in this case, which said additional insurance policy so issued is the additional insurance complained of in said defendant's second plea. Afterwards, on, to-wit, the 20th day of September, 1897, the plaintiff suffered the loss sued on in this case, and after the said loss the said defendant, with notice of the said additional insurance, and with notice that the insurer thereof was on the point of sending, or had sent, an adjuster or inspector to the place of loss, to-wit, in the city of Talladega, sent its adjuster, to-wit, A. H. Borders, to visit and inspect the said loss contemporaneously with the inspection of the said loss by the adjuster of the said Southern Mutual Fire Insurance Company of Alabama; and the said defendant, by and through its said inspector, after the said loss and damage, on, to-wit, the 21st day of September, 1897, visited the said loss and inspected the same as aforesaid. And plaintiff further avers that the said defendant continued to retain, and still retains, the said premium for the said policy sued on in this case." To the second replication the defendant demurred upon the following grounds: "(1) For that said replication is no answer to the plea. (2) For that said replication does not traverse any material allegation in said plea, nor confess and avoid the same. (3) For that said replication admits the forfeiture averred in the plea, and shows no waiver thereof by the defendant. (4) For that the forfeiture averred in the plea is confessed by the replication, and the defendant was not required by any stipulations contained in the conditions of the policy set forth in the plea or the replications to make any objections to the forfeiture, and the failure to make such objection is not a waiver thereof. (5) The defendant was not required to make any objection to the additional insurance after notice thereof, and the failure so to do is not a waiver of the forfeiture averred in the plea and admitted in the replication." To the third replication the defendant demurred upon the grounds of demurrer interposed to the second replication, and upon the following ground: "(6) For that under the facts alleged in said replication the defendant was under no obligation to return the unearned premium of said policy of insurance, and the failure to do so is not a waiver of the forfeiture of the policy." To the fourth and fifth replications the defendant demurred upon the same grounds as were interposed to the third replication. To the seventh replication the defendant demurred upon the grounds interposed to the third replication, and upon the following additional grounds: "(7) The facts averred in said seventh replication to second plea show that, in the matter of the issuing the additional policy of insurance therein mentioned, said M. G. McCargo was acting, not as the agent of this defendant, but as the agent of the company by which such additional policy of insurance was issued. (8) For that notice or information received by said M. G. McCargo in the manner stated in said replication, and at the time therein mentioned, is no notice to the defendant, for that it appears that said M. G. McCargo was then acting as agent of, and on behalf of, another company. (9) For that the alleged understanding and agreement between said M. G. McCargo and the plaintiff that the policy herein sued on was to be and remain in full force and effect is not an agreement binding upon this defendant, nor one which operates as the waiver of the forfeiture averred in the plea. (10) For that it does not ap-

pear that the alleged notice of the additional policy of insurance was given to the secretary of the defendant, and that his consent was obtained thereto in writing. (11) For that it is not averred that the alleged understanding or agreement with plaintiff that the policy herein sued on was to be and remain in full force and effect was made by any officer or agent of the defendant having authority to bind it in the premises. (12) That the alleged reference in the additional policy of insurance mentioned to the policy of insurance sued on in this case is in no sense binding upon this defendant, and does not serve to waive the admitted forfeiture of the policy sued on." To the ninth replication the defendant demurred upon the same grounds as were interposed to the seventh replicatien, and upon the following additional grounds: "(13) The averment in said replication that the adjuster of the defendant did visit said loss and inspect the same is not a waiver of the forfeiture mentioned in the second plea. (14) The averment in said replication that the adjuster visited the said loss and inspected the same, and in so doing recognized the validity of the policy, is the mere conclusion of the pleader, which is not supported by the facts alleged therein. (15) It does not appear from the allegations of said replication that the defendant's adjuster had any power or authority to waive the forfeiture mentioned in the plea. (16) It does not appear from any fact averred in said replication that the defendant's adjuster did waive the forfeiture alleged in the plea. (17) It does not appear by any facts alleged therein that the defendant waived the forfeiture mentioned in the plea." These demurrers to the several replications were each overruled, and the defendants separately excepted to these rulings. Thereupon the defendant filed the following rejoinders: "First. The allegations contained in said replication are not true, in manner or form therein alleged. Second. The alleged notice to the defendant of the additional policy of insurance mentioned in said replication prior to the loss sued on was given to one M. G. McCargo, and not to any other officer or agent of the defendant; that said M. G. McCargo had no power or authority to consent to the issuance of said additional policy of insurance; that he had no power or authority to, and in fact did not, issue the policy of insurance sued on; that said M. G. McCargo received applications for insurance, and forwarded the same to the defendant, collected premiums, and delivered the policy, and had authority to do each of these things, but he had authority to issue or countersign a policy of insurance, or to give consent to additional insurance; that it appears by the policy of insurance sued on in this case that the same was not issued or countersigned by said M. G. McCargo, and that no person other than the secretary of the defendant had authority to consent to other insurance, and that it was the duty of the plaintiff to give notice to the secretary of the defendant that he desired to obtain such consent, and that in fact the plaintiff did not give any such notice to the secretary of the defendant before the loss occurred; that the defendant was without knowledge of the issuance of the additional policy of insurance before the loss occurred, unless the knowledge of said M. G. McCargo is imputed to it." To the second replication filed by the defendant to the plaintiff's replications the plaintiff demurred upon the following grounds: "(1) Said rejoinder does not traverse any material allegation of said replication, nor does it confess the same, and by material allegation of fact or facts avoid the same. (2) It does not allege that the plaintiff, prior to said loss, had notice of any restriction placed upon the authority of the said McCargo. (3) For that it makes no difference whether or not the said McCargo had authority to issue or countersign policies, or give consent to additional insurance." This demurrer to the defendant's rejoinders was sustained, and to this ruling the defendant duly excepted. Upon issue joined on the pleadings, there were jury, and verdict for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court upon the pleadings, to which exceptions were reserved.

SHARPE, J.: The action is in the Code form, upon a policy of fire insurance. The errors assigned relate only to the action of the court in overruling demurrers to replications 2, 3, 4, 5, 7 and 9 to the second plea, and in overruling the demurrer to the special rejoinder to those replications. The second plea averred, in substance, that the plaintiff violated the contract of insurance by obtaining, contrary to its stipulations, additional insurance upon the goods alleged to have been damaged, without giving notice to, and obtaining the written consent of, the defendant. The replications in question each set up in avoidance of the plea facts depended upon as constituting a waiver on the part of the defendant of the stipulation respecting additional insurance. Provisions like the one set out in the second plea are inserted for the benefit of the insurer, and can, therefore, be waived by the insurer. Since the law of waiver and estoppel cannot be abolished by contract, the stipulation which in case of additional insurance purports to hinge the validity of the policy upon the written consent of the secretary, does not prevent the operation of the usual rules by which a waiver of that clause may be established. Such waiver may, therefore, be shown by parol, and even by acts, declarations, or conduct on the part of the insurer. Insurance Co. v. Young, 86 Ala. 424, 5 South. Rep. 116; Bouton v. Insurance Co., 25 Conn. 542; Insurance Co. v. Norton, 96 U. S. 234; Insurance Co. v. Eggleston, *Id.* 572; Insurance Co. v. French, 30 Ohio St. 240; Insurance Co. v. Earle, 33 Mich. 153; Williams v. Association (Me.), 36 Atl. Rep. 63. A waiver may be founded upon an estoppel, but it is not so necessarily. Though the conduct of the insurer may not have actually misled the insured to his prejudice, or into an altered posi-

tion, yet if, after knowledge of all the facts, its conduct has been such as to reasonably imply a purpose not to insist upon a forfeiture, the law, leaning against forfeitures, will apply the peculiar doctrine of waiver, invented, probably, to prevent them, and will hold the insurer irrevocably bound as by an election to treat the contract as if no cause of forfeiture had occurred. Kiernan v. Insurance Co. (N. Y. App.), 44 N. E. Rep. 698; Titus v. Insurance Co., 81 N. Y. 410.

Under this principle the sufficiency of the second, third, fourth and fifth replications may be tested. They set up no estoppel, but they each aver the failure of the defendant to object to the additional insurance before the loss occurred, though it had been given notice of the subsequent insurance, and a reasonable time for objections had then elapsed. The authorities appear to be generally agreed that such failure to act on the part of the insurer is evidence of an intention to waive the stipulations against additional insurance, but they are not entirely in accord as to whether such non-action in itself will constitute a waiver, as a legal conclusion. In Insurance Co. v. Young, *supra*, it is said: "If the defendant did not have notice of the forfeiture until after the destruction of the goods, some affirmative act or conduct is requisite. In such case a waiver cannot be inferred from mere silence." But, where the notice is given the company before the loss, the reason is strong for holding it to the duty of expressing its dissent in some unequivocal way, if a forfeiture is to be claimed. The right of forfeiture residing alone with the company, it should not hold it in abeyance for an unreasonable time so as to thereafter be enabled to accept or reject the contract as may suit its interests, while the other party continues bound for the premium, and ought to know whether the property is protected. Acquiescence of the company in the continuance of the contract may be more readily presumed where it may bring benefits than where nothing but loss is in sight, and the insured is therefore more likely to be misled by the lack of objection. The view that the silence of the company in such case should be treated as its assent to the additional insurance is reasonable, and it is well supported by authority. Beach, Ins. § 767; Wood, Ins. p. 807; Insurance Co. v. Lyons, 38 Tex. 253; Cromwell v. Insurance Co., 47 Mo. App. 109; Potter v. Insurance Co., 5 Hill, 147. See also Insurance Co. v. Marple (Ind. App.), 27 N. E. Rep. 633; Joliffe v. Insurance Co., 39 Wis. 111; Hayward v. Insurance Co., 52 Mo. 181. The last-mentioned replications were therefore each good, in avoidance of the plea, and the demurrers thereto were properly overruled.

Replications 7 and 9 each aver acts of the defendant's agent, McCargo, as assenting to, and thereby waiving, in behalf of the company, the breach of the stipulation in question. There is a material difference in the power of an agent in respect of waiving provisions against other insurance existing, within his knowledge, at the time of his issuance of a policy, and in respect of waiving subsequent insurance. We have only to consider his authority in the second case, and in view of the contract here involved. Where, as in this case, the contract provides whose consent shall be necessary to the allowance of a second policy, the insured is bound by it, and while it is operative the consent of another person will not suffice. Wood, Ins. 796; Insurance Co. v. Hurd, 19 Ohio, 149. The provision, however, may be modified or changed, and the alteration may be shown by proof that the company has actually conferred the power on another, or that it has held out one as having the power. Bid. Ins. § 1081. Not every agent of an insurance company, though authorized and held out as being authorized to transact business for it, can waive a forfeiture arising from subsequent insurance. And one "who is only authorized to solicit and take applications for insurance, and receive the premiums and deliver the policy after having been signed by the proper officers, has no authority, express or implied, to waive" such breach. Insurance Co. v. Young, *supra;* Insurance Co. v. Oates, 86 Ala. 558, 6 South. Rep. 83; Insurance Co. v. Copeland, 90 Ala. 386, 8 South. Rep. 48; Taylor v. Insurance Co., 98 Iowa, 521, 67 N. W. Rep. 577; Insurance Co. v. Heiduk, 30 Neb. 288, 46 N. W. Rep. 481. And, where a merely local agent is depended upon as having authority to receive notice of such other insurance, the burden of showing that his authority extends so far rests upon the assured. Mellen v. Insurance Co., 17 N. Y. 609; Insurance Co. v. Fay, 22 Mich. 467. Neither of the replications 7 and 9 show authority in McCargo to either waive the breach averred in the second plea, or to receive notice upon which a waiver by the defendant might be based. The overruling of the demurrers left the want of authority to be set up by rejoinder, one effect of which was to misplace the burden of proof. The retention of the premium and the inspection of the damage by the company, without any expense or inconvenience to the plaintiff, do not, either by themselves or in connection with the other matters averred in the ninth replication, show a waiver of forfeiture, as a legal result. At most, they are only circumstances which, under proper pleading, might be evidence upon the question of an intention to waive.

The special rejoinder averred facts showing a lack of authority in McCargo sufficient to meet each of the several replications to which it was interposed, and was not subject to the demurrer. It was unnecessary, however, to rejoin those facts specially to the second, third, fourth, and fifth replications, since the general rejoinder to them would have put such authority in issue; and, if replications 7 and 9 had sufficiently averred McCargo's authority in the premises, the special rejoinder would likewise have been unnecessary as to them. For the errors indicated the judgment must be reversed, and the cause will be remanded.

NOTE.—*Changing the Terms of the Policy.*—Where the agent of the insurance company is furnished with blank policies properly signed by the company, which he is authorized to fill up, countersign, and deliver to the insured, he is constituted a general agent, and may insert or strike out conditions in the policy, although the policy provides that the agent shall have no authority to waive, modify, or strike from the policy any of its printed conditions. Continental Ins. Co. v. Ruckman, 127 Ill. 364. This is upon the theory that until the contract of insurance is completed, there are no conditions to be waived or modified. See Hancock Life Ins. Co. v. Schlink, 175 Ill. 284, 51 N. E. Rep. 795. It follows from the above that after the contract of insurance is completed, and the policy is delivered, the agent cannot waive any of its terms unless he is previously authorized, or his acts are subsequently ratified by the company. Where the policy provides that it shall not be binding until the first premium is paid in cash, the agent, if a general one, may nevertheless waive this condition and accept payment in goods or notes. American Employers' Ins. Co. v. Fordyce, 62 Ark. 562; Miss. Valley Ins. Co. v. Neyland, 9 Bush, 430; Ins. Co. v. Colt, 20 Wall. 560; Southern Life Ins. Co. v. Booker, 9 Heisk. 606; Trustees, etc. v. Ins. Co., 18 Barb. 69; Hancock Life Ins. Co. v. Schlink, 175 Ill. 284. But a local agent of the company, whose duty it is merely to solicit insurance and receive premiums, has no authority to waive or alter the conditions of the policy. Graham v. Niagara Fire Ins. Co., 32 S. E. Rep. 579; Underwriter's Agency v. Sutherlin, 55 Ga. 266, 267; Ritch v. Association, 99 Ga. 112, 25 S. E. Rep. 191; Hausen v. Ins. Co., 66 Mo. App. 29; Laundry Co. v. Ins. Co., 66 Mo. App. 199. A stipulation in a policy that no agent is authorized to change or waive any of the conditions of the policy, applies only to those conditions which relate to the formation and continuance of the contract of insurance, and not to those which are to be performed after the loss has occurred in order to enable the insured to sue upon the contract. Carson v. Jersey City Ins. Co., 43 N. J. Law, 300; The Indiana Ins. Co. v. Capthart, 108 Ind. 270; Insurance Co. v. Refrigerating Co., 162 Ill. 322, 44 N. E. Rep. 746.

Additional Insurance.—A provision in the policy that if insured obtains additional insurance without giving notice to the company and obtaining its consent, the policy shall be forfeited, is valid, and will be upheld. Herman Ins. Co. v. Heiduk, 30 Neb. 288; Jinck v. Phœnix Ins. Co., 60 Iowa, 266; Segg v. Hartford Fire Ins. Co., 98 N. Car. 143. But where the agent knows at the time he issues the policy that there is additional insurance upon the property, this knowledge will be imputed to the principal, and in case of loss an action may be maintained on the policy, although it is provided that such consent must be written upon the policy. Roberts v. The Continental Ins. Co., 56 Wis. 321; Home Fire Ins. Co. v. Bernstein, 75 N. W. Rep. 839; Gans v. Ins. Co., 43 Wis. 108; Mutual Fire Ins. Co. v. Ward, 28 S. E. Rep. 209; Swain v. Macon Fire Ins. Co., 29 S. E. Rep. 147; Gardy v. Orient Ins. Co., 29 S. E. Rep. 655. After the policy is issued, and notice of the additional insurance is brought home to the general agent of the company, this notice is imputed to the principal. Bennett v. Council Bluffs Ins. Co., 31 N. W. Rep. 948. And the agent may waive the requirement that consent to the additional insurance shall be indorsed on the policy. Van Allen v. Farmers' J. S. Ins. Co., 4 Hun, 413; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143. It is decided in Hamilton v. Home Ins. Co., 94 Mo. 353, contrary to the holding in the principal case, that where the agent of the first company is also the agent of another company, and he issues the additional insurance in such other company, that is sufficient notice to the first company of the additional insurance. See also to the same effect, McCollum v. Ins. Co., 66 Mo. App. 66, 76. But where the insurer notified the agent of the insured that she intended to take out additional insurance, this was held to be no notice of the additional insurance when afterwards taken out. Eagle Fire Ins. Co. v. Globe Loan & Trust Co., 44 Neb. 380. And when the insured, at the time the policy was issued, notified the insurer that he would want some additional insurance in the fall when his stock of goods was to be increased, and the insurer agreed to give it, it was held that this did not authorize the insured to take out additional insurance in another company. Morris v. Orient Ins. Co., 33 S. E. Rep. 430. As before suggested, the insurer may provide that the policy shall be forfeited in case the insured procures additional insurance or violates other material conditions of the policy without the knowledge and consent of the company. But although it is provided that the policy shall be void upon breach of certain conditions, yet it is only voidable at the option of the company. Slobodiskey v. Phœnix Ins. Co., 52 Neb. 395; Home Fire Ins. Co. v. Kuhlman, 78 N. W. Rep. 936; Kingman v. Lancashire Ins. Co., 32 S. E. Rep. 762.

Waiver.—Being thus voidable, the forfeiture may be waived by the company. This waiver need not be based on estoppel or new agreement. Titus v. Ins. Co., 81 N. Y. 410. See also Billings v. Ins. Co., 34 Neb. 502, 52 N. W. Rep. 397. No new consideration is needed to support the waiver. Kingman v. Lancashire Ins. Co., 32 S. E. Rep. 762. Where the waiver is once made, the forfeiture cannot afterwards be taken advantage of. Ins. Co. v. Baker, 153 Ill. 240, 38 N. E. Rep. 627. What amounts to a waiver must be determined largely by the facts of each case. It is generally held that if the company, before the loss occurs, receives notice of facts which are ground for avoiding the policy, but does nothing, this amounts to a waiver. Ins. Co. v. Lyons & Co., 38 Tex. 252; Potter v. Ins. Co., 5 Hill, 147; Williamsburg City Ins. Co. v. Cory, 83 Ill. 453. *Contra:* Johnson v. American Ins. Co., 41 Minn. 396, 40 N. W. Rep. 54. But after the loss has occurred, the mere silence of the company is not sufficient to constitute a waiver of the forfeiture; there must be some conduct on its part, showing an intention to treat the contract as binding. Titus v. Ins. Co., 81 N. Y. 410. Thus, where the insurer, after the loss had occurred, and after receiving knowledge of the additional insurance, directed insured to write out and present his claim in accordance with the terms of the policy, this was held to be no waiver of the breach of the condition, providing against additional insurance. Phœnix Ins. Co. v. Stevenson, 78 Ky. 150.

Appraisal and Arbitration.—Where the company participates in an adjustment of the loss, but it is stipulated that such action shall not amount to a waiver of any of its rights, it will not be estopped from insisting upon a forfeiture or account of some broken condition. Joyce v. S. C. Mutual Ins. Co., 32 S. E. Rep. 446; Hill v. London Assurance Co., 16 Daly, 120; Whipple v. N. British & Mer. Fire Ins. Co., 11 R. I. 139; Jewett v. The Home Ins. Co., 29 Iowa, 562; Queen Ins. Co. v. Young, 86 Ala. 424; Briggs v. Firemen's Ins. Co., 65 Mich. 52; Johnson v. American Fire Ins. Co., 43 N. W. Rep. 59; Boyd v. Vanderbilt Ins. Co., 16 S. W. Rep. 471. But where it submits the matter to arbitration, this is evidence

tending to show that the company has waived the forfeiture. Eagle Fire Co. v. Globe Loan & Trust Co., 44 Neb. 380; Allemania F. Ins. Co. v. Pitts. Expo. Society, 11 Atl. Rep. 572.

Unearned Premiums.—Where a condition has been broken, and the company has declared a forfeiture, the insurer is not entitled to recover the unearned premiums. Ins. Co. v. Stevenson, 78 Ky. 150; Colby v. Ins. Co., 66 Iowa, 577, 24 N. W. Rep. 59; Jackson v. Millspaugh, 103 Ala. 175, 15 South. Rep. 576.

St. Louis, Mo. GEO. D. HARRIS.

JETSAM AND FLOTSAM.

NECESSITY FOR SPECIAL PLEA OF PAYMENT.

We observe in a recent number of the CENTRAL LAW JOURNAL an article, entitled "Necessity for Special Plea of Payment," by Archibald R. Watson. The subject is a live and important one, the observations upon it of special interest to New York lawyers, inasmuch as the position is taken that several of the decisions of this State are erroneous on the point in question. The necessity for a special plea or answer of payment is regulated with us by statutory enactment, appearing as section 500, Diossy's New York Code of Civil Procedure (1891). This section, which is doubtless familiar to most practitioners, provides that the answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. The New York cases which are the subject of special criticism seem to be Lent v. New York, etc. R. Co., 130 N. Y. 504, and Dry Dock, etc. Co. v. North and East River R. Co., 3 Misc. Rep. 61, though other adjudications of the courts of this State are cited and touched upon. The first of these cases was an action against a railroad company upon an award of commissioners of appraisal for lands taken for railroad purposes. It decides, primarily, not the necessity for a special plea of payment or a particular averment of payment in the answer, but the necessity for an allegation of non-payment in the complaint. But the two subjects are intimately co-related, as is pointed out by the article in question, for under the Code provision cited new matter in an answer, must be stated, and what is new matter depends upon the material allegations of the complaint, as being something else, not put in issue by a general denial. Before reviewing these cases it may be well to advert to one or two of the general rules of pleading under the Codes, and the effect of a general denial, which, we believe, may properly be regarded as settled. First, new matter in the answer, requiring special statement under the Codes, is matter not involved in the general denial. Second, a general denial puts in issue such averments and such only as are material to the plaintiff's cause of action. It is also true that whatever it is necessary for the plaintiff to prove to make out his case, it is also essential for him to allege in his complaint; and whatever it is necessary for him to allege in his complaint it is likewise imperative for him to prove—if not admitted. Now, to return to Lent v. Railroad Company. This case decides that an averment of non-payment is necessary in the complaint, but also declares that evidence of non-payment is never admissible under a general denial. The following is the language of this court: "It does not admit of controversy that upon an ordinary contract for the payment of money non-payment is a fact which constitutes the breach of the contract and is the essence of the cause of action, and being such within the rule of the Code it should be alleged in the complaint. It is said, however, that payment is always an affirmative defense which must be pleaded to be available, and hence non-payment need not be alleged, as it is not a fact put in issue by a general denial. • • • Following the rule thus established under the former practice, the courts have uniformly held, since the adoption of the Code, that payment must be pleaded and cannot be proven under the general issue." It is this general statement of the rule that Mr. Watson objects to, his contention being that it ignores a fundamental distinction between the two kinds of payment, viz: payment before breach or at maturity or when due, and payment after breach, the latter variety of payment, if it may be so termed, being new matter, but the former in no conceivable sense so. And it must be admitted that the very language of the opinion just quoted to some extent bears out this contention, non-payment being "the essence of the cause of action" in a suit on a contract to pay money. If, then, such fact is the essence of the cause of action, the query naturally arises, why is it not put in issue by a general denial? The answer that payment is new matter, and, therefore, must be specially set up, is not satisfactory, because payment is, as has been seen, not necessarily new matter. The case of Dry Dock, etc. Co. v. North and East River R. Co., 3 Misc. Rep. 61, decided by the New York Court of Common Pleas, drawing inspiration from the Lent case, holds without qualification that, in an action for money due on contract, when the complaint alleges non-payment, a mere general denial raises no issue as to the fact of payment. This action was brought on an "agreement called a lease" for an installment of rent alleged to be due. The defendant pleaded a general denial, and the plaintiff offered his lease in evidence, and there rested. The defendant thereupon moved to dismiss the complaint for defect of proof of liability under the lease as to the installment of rent claimed, offering no evidence. But the trial court directed a verdict for the plaintiff, and the Court of Common Pleas upheld the proceeding. That this strikes one as anomalous cannot be denied, and the author of the article referred to maintains that the decision is plainly erroneous. In his opinion, we deduce from the arguments presented, the plaintiff should have been required to prove that the installment had not been paid when due, or a breach of the contract sued on. It would doubtless be competent for the legislature to say to defendants in an action, If you do not specifically set up payment in your answer, then no evidence of payment is admissible, and the omission of such an averment shall be taken as a confession of the plaintiff's cause of action where the breach alleged is non payment. But the legislature has not done this, and to the provision as to new matter is not, apparently, to be attributed this effect. Where the payment relied on as a defense is made after breach, then, beyond question, it is new matter, and should be specially set up under the Code provision cited. Where, however, payment is made before breach or at maturity, and in accordance with the terms of the contract, then it is certainly not new matter, and hence, it would seem, need not be specially pleaded. Mr. Watson thus summarizes the rules

on this subject as in accord with principle and the best considered authority: (1) New matter in the answer under the Codes is matter in defense not involved in the issue raised by the general denial. (2) The general denial puts in issue all the material allegations of the complaint, but only such as are material. (3) Plaintiff must allege facts sufficient to show a cause of action. (4) In an action on a contract to pay money its breach, that is, non-payment according to the terms of the contract, must be alleged. (5) A general denial puts in issue nothing more than a breach of the contract, although the complaint, speaking as of the time of the institution of the suit, may allege that the debt remains unpaid, because the allegation of continued default is not material to the plaintiff's cause of action, and consequently, as stated, is not put in issue by a general denial. (6) Payment after breach is new matter, and as such is inadmissible in evidence in the absence of the special plea. (7) Payment before breach or when due or at maturity is not new matter, and is admissible in evidence without special plea. (8) The doctrine that a general denial does not put the fact of payment when due or at maturity in issue, and, hence, that the plaintiff need not prove such fact, is erroneous.

The latter part of this last proposition is the position which seems to be maintained by the two New York cases to which we have referred, expressly by one, only inferentially, perhaps, by the other. We think the matter might well receive the attention of New York courts and lawyers, as well as those of other jurisdictions, which, it is charged, have fallen into the same error. Payment may be new matter, or it may not be, and upon this depends the necessity for a special plea.—*Albany Law Journal.*

BOOK REVIEWS.

LAWSON ON PRESUMPTIONS OF LAW AND FACT.

The second revised and enlarged edition of the Law of Presumptive Evidence by John D. Lawson, LL.D., has much to commend it to the profession aside from the fact that it brings the subject up to date. Under the topics, Presumptions of Knowledge, Regularity, Innocence, Continuance, Uniformity and Presumptions in the Law of Real Estate, and in criminal cases, the distinguished author has marshalled the law in 122 rules and 17 subrules upon which the adjudicated cases rest. Citations on the margin of the rule indicate where it has been approved by courts of last resort. This is, we believe, a novel, and obviously a convenient feature. Each rule and subrule is given, discussed and copiously illustrated in an orderly manner, indeed so orderly, clearly and amply as seems to us should serve as a model for text-writers. In the whole scope of text literature we do not know of the laws being presented in a plan or method so admirable, engaging, and convenient for reference, and the author's reputation sufficiently insures its value as an authority. The text work is faithful and properly supplemented with foot notes. About 5,500 cases are cited. The volume contains some 800 octavo pages, is well printed on durable paper and well bound. Published by Central Law Journal Co., St. Louis, Mo.

C. L. C.

HUMORS OF THE LAW.

"Your worship," said the wily solicitor, who was defending the stalwart prisoner in the dock, "you cannot possibly convict my client of house-breaking. I submit, sir, with all deference, that neither morally nor legally can you convict him. I will tell you why.

"Mr. Sikes, here, as the evidence clearly proves, did not break into any house at all. He found the parlor window open, as the witnesses admit, and all he did was to put in his right arm and remove some unimportant articles. Now, sir, Mr. Sike's arm is not himself, and I fail to see how you can punish the whole individual for an offense committed by only one of his limbs."

"Very well, sir," said the cautious Solomon of the bench, "I have heard of a similar defense before today, so I find the prisoner's arm guilty, and sentence it to six months' imprisonment. The gentleman himself can accompany it or not, as he chooses. Mr. Clerk, read the sentence."

Then Mr. Sikes smiled a fourteen-inch smile, and the plan of the defense became apparent, as he quietly proceeded to unscrew his guilty cork arm and leave it in the custody of the court.

C. S. Batterman, one of the best known mining men in the Rocky Mountain States, was on the stand as an expert in an important mining case in Nevada, and was under cross-examination by a rather young and "smart" attorney. The question related to the form that the ore was found in, generally described as "kidney lumps." "Now, Mr. Batterman," said the attorney, "how large are these lumps—you say they are oblong—are they as long as my head?" "Yes," replied Mr. Batterman, "but not as thick." The attorney subsided, and even the judge could not help smiling.—*Argonaut.*

A wildly turbulent peasent was once a witness in a trial before Chief Baron O'Grady. The counsel, after pestering him for some time, put a question to him which reflected on the witness' character. "If ye ax me that again I'll give ye a kick in the gob!" was the answer. The counsel appealed to the court, stating that an answer was necessary to his client's case, ending up with the query: "What would your lordship advise me to do?" "If you are resolved to repeat the question," replied the court, "I'd advise you to move a little from the witness."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTIONS — Joinder of Inconsistent Counts.—A plaintiff who claims to have been induced to enter into a contract by the fraud and misrepresentations of defendants may join a count for rescission with one for damages, where defendants have refused to rescind, as, if it should be determined that he had waived his right to a rescission, such fact would not preclude him from recovering damages for the fraud if it was established.—GLOVER v. RADFORD, Mich., 79 N. W. Rep. 803.

2. ACTION FOR INJURY TO LAND — Venue.—An action for consequential injuries to land, or a suit for a mandatory injunction requiring the defendant to abate a nuisance on his own land causing injury to the land of the plaintiff, is, under our Code, not local, but transitory in character; and, under section 5031, Rev. St., must be brought in the county where the defendant resides or may be summoned.—CITY OF FOSTORIA v. FOX, Ohio, 54 N. E. Rep. 370.

3. ADVERSE POSSESSION—Color of Title.—Conveyance of land in fee-simple by one who has no title is such color of title as will support adverse possession.—ALLEN v. VAN BIBBER, Md., 43 Atl. Rep. 758.

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Mortgaged Property.—Where a trustee, under an assignment for the benefit of creditors, takes possession of mortgaged leasehold property, and collects rents therefrom, the mortgagor having expressly covenanted, for himself and assigns, to pay the ground rent and all taxes on the premises when legally demandable (the mortgage debt being overdue at the date of the assignment, and taxes, ground rent, and interest being in arrear, and the mortgage security being insufficient), he is bound, on demand by the mortgagee, to apply rents so collected to such taxes, ground rent, and interest.—BARRON v. WHITESIDE, Md., 43 Atl. Rep. 825.

5. ATTORNEY — Disbarment.—The relation of counsel and client is one of the highest trust and confidence, and the counsel is under a duty to observe the strictest integrity in his dealings with his client, and a just regard for his interest.—IN RE MCDERMIT, N. J., 43 Atl. Rep. 685.

6. BANKRUPTCY—Discharge — Keeping Books of Account.—The bankrupt's omission to keep books of account cannot be made a ground of opposition to his discharge, when it appears that, since a time more than three years prior to the passage of the bankruptcy act, he has not been engaged in any business to which the keeping of books would be necessary or appropriate.—SELLERS v. BELL, U. S. C. C. of App., Fifth Circuit, 94 Fed. Rep. 801.

7. BANKRUPTCY — Dissolution of Liens.—Where actions are begun in a State court, and writs issued and levied on property of an insolvent debtor, within four months before the institution of proceedings in involuntary bankruptcy against him, the trustee is entitled to recover possession of such property from the sheriff holding the same under the levy, notwithstanding the pendency of an action of replevin in a State court against the sheriff by a stranger claiming ownership of the property; and the court of bankruptcy has jurisdiction to order the surrender of the property on summary petition by the trustee.—IN RE FRANCIS-VALENTINE CO., U. S. C. C. of App., Ninth Circuit, 94 Fed. Rep. 793.

8. BANKRUPTCY—Jurisdiction—Suits by Trustee.—The district court, as a court of bankruptcy, has no jurisdiction of a petition by a trustee in bankruptcy for the cancellation of a conveyance of land previously made by the bankrupt to his wife, and alleged to have been fraudulent as to creditors, and for the recovery of the land for the benefit of the estate, nor to enjoin the bankrupt's wife from prosecuting a suit against the trustee to recover personal property claimed by her.—CAMP v. ZELLARS, U. S. C. C. of App., Fifth Circuit, 94 Fed. Rep. 799.

9. BANKRUPTCY—Priority of Claims—Liens.—Where a statute of the State creates a lien in favor of employees performing certain kinds of labor, but provides that such lien shall not continue in force unless a statement thereof is filed within 30 days, and action begun within 3 months, holders of such liens, perfected according to the statute, against the bankrupt employer, are entitled to payment in full out of the proceeds of the property affected, in preference to claims for labor of the same kind which have not been preserved as the statute directs, although both classes of claims are equally within the description of claims for "wages," as to which the bankruptcy act declares that they shall "have priority, and be paid in full out of bankrupt estates."—IN RE KERBY-DENIS CO., U. S. D. C., E. D. (Wis.), 94 Fed. Rep. 818.

10. BILLS AND NOTES — Accommodation — Married Woman.—The negotiable note of a married woman, given for the accommodation of the payee, is void, under 2 Gen. St. p. 2017, pl. 26, unless such married woman knowingly obtains therefor something of value for her own use, or for the use, benefit, or advantage of her separate estate. The note of the payee, given on condition that the same shall not be used, is not a thing of value, under said statute.—VLIET v. EASTBURN, N. J., 43 Atl. Rep. 741.

11. BILLS AND NOTES — Consideration — Pleading.—Where plaintiff sues on a note reciting that it was given for services rendered, under an answer averring that no services were rendered at its execution, defendant may prove that fact, since the recital is no more than a receipt incorporated into the note, and is open to explanation as if it were in a separate instrument.—MULLIGAN v. SMITH, Colo., 57 Pac. Rep. 731.

12. BILLS AND NOTES — Pleading—Waiver of Verification.—Burns' Rev. St. 1894, § 367, provides that, where a pleading is founded on a written instrument, such instrument may be read in evidence on the trial without proving its execution, unless its execution be denied by pleading under oath, or by an accompanying affidavit. Held, that the failure of plaintiff to move to reject unverified pleas denying the execution of the note sued on does not waive the want of verification.—CINCINNATI BARBED WIRE FENCE CO. v. CHENOWETH, Ind., 54 N. E. Rep. 403.

13. BUILDING AND LOAN ASSOCIATION—Stockholder.—A Virginia stockholder in a building and loan association, organized under the laws of New York, who has made a loan from it, is chargeable with premiums for the loan, which the statutes of New York expressly authorize and declare shall not be deemed a violation of any statute against usury.—COWAN v. NAT. MUT. BLDG. & LOAN ASSN., Va., 33 S. E. Rep. 553.

14. CARRIERS OF PASSENGERS—Negligence.—Where a passenger was thrown from his seat and injured by a

collision between sections of a train which in some way became uncoupled while running, a presumption of negligence on the part of the carrier arises.—STEELE v. SOUTHERN RY. CO., S. Car., 33 S. E. Rep. 509.

15. CONSTITUTIONAL LAW—Aliens—Use in Evidence of Private Papers Unlawfully Seized.—The fourth and fifth constitutional amendments, which protect persons against unreasonable searches and seizures, and against being compelled to be witnesses against themselves in criminal cases, may be invoked in behalf of aliens residing in the United States, and they protect persons not only from the unreasonable seizure of their private papers, but from the use of such papers, when unlawfully seized, as evidence against them in cases involving a forfeiture of their property or personal rights.—UNITED STATES v. WONG QUONG WONG, U. S. D. C., D. (Vt.), 94 Fed. Rep. 832.

16. CONSTITUTIONAL LAW—Ejectment.—An act of the general assembly validating title to land claimed by an incorporated church society under a deed given to it before its incorporation is constitutional, no private rights having supervened.—CENTRAL BAPTIST CHURCH v. MANCHESTER, R. I., 43 Atl. Rep. 845.

17. CONSTITUTIONAL LAW—License — Validity of Ordinance.—Under Const. U. S. art. 1, § 8, confiding to congress the power to regulate interstate commerce, an ordinance of a city, fixing a special license tax for all occupations carried on within said city, is void as to the agent of a non-resident company, engaged in delivering pictures under a contract previously made between the customer and said company, and selling frames to customers only, with whom the purchase of the same is voluntary, and independent of the contract for the picture.—CITY OF LAURENS v. ELMORE, S. Car., 33 S. E. Rep. 560.

18. CONSTITUTIONAL LAW — Police Power — Health Regulations.—A municipal corporation, whose charter provides that its council shall have full power to regulate privies, specify the character of boxes and other fixtures for them, and pass such ordinances as they may deem necessary to preserve the health of the town, has authority to determine what kind of privy vaults shall be used, and the courts will not review its discretion in so determining.—SPRIGG v. TOWN OF GARRETT PARK, Md., 43 Atl. Rep. 813.

19. CONSTITUTIONAL LAW—Right to Jury Trial.—Article 15 of the bill of rights provides that no subject shall be imprisoned or deprived of his property but by the judgment of his peers or by the law of the land. Pub. St. ch. 248, §§ 3, 7, and *Id.* ch. 252, § 2, give justices and police courts authority to hear and determine actions of a criminal nature in which the punishment does not exceed $20 or imprisonment for six months, or both, subject to a right of appeal to the supreme court by the accused. Held, that the statute is not unconstitutional, on the ground that it deprives the accused of a trial by jury in cases of which justices had no jurisdiction at the adoption of the constitution.—STATE v. JACKSON, N. H., 43 Atl. Rep. 749.

20. CONTRACT—Parol Evidence.—Where a person agreed in writing to take charge of a business for the owner, and pay over the net proceeds until they amounted to a certain sum, when the owner was to transfer the business to him, parol evidence is inadmissible to show that, as part of the consideration, the owner orally agreed not to engage in a similar business in the city, in the absence of fraud or mistake.—SLAUGHTER v. SMITHER, Va., 33 S. E. Rep. 544.

21. CONTRACTS—Public Policy—Judgment.—An agreement to vacate a judgment, and deed certain land to the judgment debtor, in case he will testify in favor of the judgment creditor in a suit then pending, and the latter is successful, is void, as being against public policy.—BOWLING v. BLUM, Tex., 52 S. W. Rep. 97.

22. CONTRACT OF GUARANTY—Construction.—Defendant signed an agreement to be bounden for stock delivered by plaintiffs, dealers in building materials, to a contractor and builder, to the amount of $200, and to pay the same. Held, that it was not a continuing guaranty covering a balance not exceeding $200, due on a subsequent account with the contractor, but bound defendant to pay for a sale not exceeding that amonnt.—SHERMAN v. MULLOY, Mass., 54 N. E. Rep. 345.

23. CORPORATIONS—De Facto Corporation.—Where there is no statute authorizing the creation of a corporation to conduct a particular class of business, persons acting as a corporation in that business under an attempted incorporation do not constitute a *de facto* corporation, so as to preclude one sued by it to deny its corporate existence, as there cannot be a *de facto* corporation unless a *de jure* corporation is possible.—INDIANA BOND CO. v. OGLE, Ind., 54 N. E. Rep. 407.

24. CORPORATIONS—Stock Subscriptions.—A resolution of a corporation, requiring subscribers to its stock to pay a stated sum on their shares within a certain time, either in cash or by a promise to pay in the form of a land contract or contracts, whereupon stock is to become full paid, is too indefinite to support an action against a stock subscriber for the non-payment of the sum called for, because it fixes no terms by which either the directors or stockholders are to be governed in settlement of the balance due the corporation, and fails to state at whose option payment may be in cash or by land contract.—NORTH MILWAUKEE TOWN-SITE CO. NO. 2 v. BISHOP, Wis., 79 N. W. Rep. 785.

25. CORPORATIONS — Stock Subscriptions — Voidable Contracts.—A stockholder who has lost the right to rescind his contract of subscription cannot, in an action by a trustee of the insolvent company to recover on an unpaid stock subscription, disaffirm a voidable contract between the company and its directors, and defeat his liability, though the suit is to collect money with which to pay obligations arising out of the contract, since the right to disaffirm such a contract can only be exercised by the stockholders collectively.—URNER v. SOLLENBERGER, Md., 43 Atl. Rep. 810.

26. CORPORATIONS—Transfer of Commercial Paper—Ratification.—Though the secretary of a corporation has no authority to transfer commercial paper, yet the corporation may, by its subsequent conduct, ratify such a transfer.—MCCORNICK v. BITTINGER, Colo., 57 Pac. Rep. 736.

27. COUNTY COMMISSIONERS—Contract for Bridge.—A contract made by county commissioners for the purchase and erection of a bridge, in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party.—BUCHANAN BRIDGE CO. v. CAMPBELL, Ohio, 54 N. E. Rep. 372.

28. CRIMINAL LAW—Assignment of Counsel—Waiver.—The right of an accused in a criminal prosecution to have the assistance of counsel in his defense, guarantied by the last clause of section 8, of article 1, of the constitution, may be waived. When the record and bill of exceptions do not show any request for the assignment of counsel made or refused, but only show that no counsel appeared for the accused, no error is disclosed, for it will be presumed that the accused did not desire the assistance of counsel.—STATE v. RANEY, N. J., 43 Atl. Rep. 677.

29. CRIMINAL LAW—Homicide.—An instruction on a trial for murder that no man by his lawless acts can create a necessity for acting in self-defense, and that the plea, of necessity, is a shield only to those who are without fault in occasioning it, but that defendant can show in justification that, though he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind, and endeavored to escape from it, but could not without striking a mortal blow, though not approved, does not constitute error.—PEOPLE v. MILLER, Cal., 57 Pac. Rep. 770.

30. CRIMINAL LAW—Homicide—Mob Violence.—Gen. Laws (Sp. Sess.), 25th Leg. p. 40, providing that "wher-

ever two or more persons shall combine together for the purpose of mob violence," and in pursuance thereof shall take human life by such violence, they are guilty of "murder by mob violence," and shall be tried in another county than that where the homicide occurred, is void for uncertainty in defining mob violence.—AUGUSTINE v. STATE, Tex., 52 S. W. Rep. 77.

31. CRIMINAL LAW—Turning State's Evidence.—An agreement to dismiss a prosecution if defendant will turn State's evidence is not binding on the State, where defendant, in testifying for the State, falsely denies the existence of the agreement.—TULLIS v. STATE, Tex., 52 S. W. Rep. 83.

32. CRIMINAL TRIAL—Homicide—Experimental Tests.—It is not error to allow experimental tests in a murder trial to be made by the prosecuting officers, but it is the better practice to have such tests made by other witnesses.—PEOPLE v. CRANDALL, Cal., 57 Pac. Rep. 785.

33. DAMAGES—Breach of Contract to Convey Realty.—On the breach of a contract for the sale of real estate, special damages resulting to the purchaser from the failure to make a resale are only recoverable where the contract for resale was brought to the knowledge of the defendant, and by reason of such knowledge he impliedly undertook, in case of his failure, to make conveyance to pay such special damages by way of indemnity.—LYNCH v. WRIGHT, U. S. C. C., S. D. (N. Y.), 94 Fed. Rep. 703.

34. DEED—Boundaries—High-Water Mark.—In the absence of clear evidence of an intention to limit the boundaries of land described in a conveyance as extending to the high-water mark to such boundary, the same will be presumed to extend to low-water mark, under Code, § 1339, which provides that the limits or boundaries of the several tracts of land lying on any bay, creek, river or sea in this commonwealth, and the rights of the owners, shall extend to low-water mark.—WAVERLY WATER FRONT & IMP. CO. v. WHITE, Va., 33 S. E. Rep. 534.

35. DEEDS—Delivery.—Where a person, believing herself to be on her deathbed, executed a deed, and gave it to a third person, with instructions to return it to her if she recovered, otherwise to give it to the grantee, there was no delivery, and could be none after the grantor's death.—WILLIAMS v. DAUBNER, Wis., 79 N. W. Rep. 748.

36. DEEDS—Execution—Delivery.—A grantor's deposit of a deed with a bank cashier, to be filed for record if the grantor died during the life of the grantee, and otherwise to be returned, is not a sufficient delivery to vest title in the grantee.—KENNEY v. PARKS, Cal., 57 Pac. Rep. 772.

37. DEEDS—Evidence of Contemporaneous Parol Contract.—Where an estate in fee-simple has been conveyed by deed, evidence of a contemporaneous parol contract, alleged as a part of the consideration for the conveyance, to the effect that the grantee should dedicate the land conveyed, together with other lands, for public use as a street, is inadmissible, as such agreement, if enforced, would vary the deed by depriving, in perpetuity, the grantee of the control and possession of the property.—HIGHLAND PARK CO. v. WALKER, Colo., 57 Pac. Rep. 759.

38. DIVORCE—Desertion—Evidence.—Where a wife refuses, even wrongfully, to live with her husband, but subsequently admits him to his marital rights, the period of her previous refusal cannot be held to be part of two years of willful, continued and obstinate desertion.—TRACEY v. TRACEY, N. J., 43 Atl. Rep. 713.

39. EJECTMENT—Limitation of Actions.—The running of limitations prescribed by Mansf. Dig. § 4476, against actions for the recovery of the possession of land where plaintiff does not claim title, is not suspended or affected by the death of one entitled to possession leaving minor heirs, where limitations had begun to run before death occurred.—MURRAY v. HOUGHTON, I. T., 52 S. W. Rep. 48.

40. EQUITY—Action Against Executors.—A court of equity will entertain an action brought by an executor on the part of the estate against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case, where justice requires it, there being no remedy at law.—PETERSON v. VANDERBURGH, Minn., 79 N. W. Rep. 828.

41. EQUITY—Cancellation of Contract.—A bill which avers that complainants were induced, by the false and fraudulent representations of defendants, to purchase an option on mineral land and to expend money in its development, and praying the cancellation of such option, which by its own limitations would become void by lapse of time, and which imposed no burden on complainants, and for the repayment of the sums paid therefor and expended in the improvements, does not present a case for equitable cognizance, as there is an adequate remedy at law.—BUCK v. WARD, Va., 33 S. E. Rep. 513.

42. ESTOPPEL—Contracts—Considerations.—A person executing a contract to enable the other party to it to perpetrate a fraud on third persons is estopped from asserting its invalidity.—HUBBARD v. MULLIGAN, Colo., 57 Pac. Rep. 738.

43. EXECUTION—Growing Crops.—A growing wheat crop raised by a tenant under a lease by which he was to properly care for and harvest it, and deliver a part thereof to the landlord as rent, is not subject to levy on execution against the tenant, where the life of the execution will expire before the crop is ripe for harvest.—TIPTON v. MARTZELL, Wash., 57 Pac. Rep. 806.

44. EXPERT TESTIMONY—Witnesses.—Opinion of an expert witness as to whether a cast-iron elbow to a boiler was obviously safe or unsafe was not incompetent because that was an ultimate fact to be determined by the jury.—DALY v. CITY OF MILWAUKEE, Wis., 79 N. W. Rep. 752.

45. EXTRADITION—Warrant.—An extradition warrant is sufficient to entitle an agent of another State to the custody of a fugitive therefrom, where it recites that the executive authority of the State from which the fugitive fled demanded him, and that the demand was accompanied by a copy of the indictment, certified by the governor to be authentic, under Rev. St. U. S. § 5278, requiring a governor of a State to which the fugitive has fled to cause his delivery, where such demand is made and copy of indictment is produced.—IN RE FOYE, Wash., 57 Pac. Rep. 825.

46. EVIDENCE—Declarations of Testator—Undue Influence.—Declarations of a testator as to his testamentary intention, whether made before, after or at the time of the execution of the will, are admissible on the issue of undue influence, not as primary proof thereof, but to establish the effect of external acts, if any are shown, on the mind of the testator.—IN RE BURNS' ESTATE, Tex., 52 S. W. Rep. 98.

47. EVIDENCE—Parol Evidence—Trust Deed.—Where there is no allegation of fraud, surprise or mistake, either of law or fact, parol evidence is inadmissible to contradict the terms of a trust deed as to the *cestui que trust* therein named.—AMERICAN NAT. BANK v. HARLAN, Md., 43 Atl. Rep. 756.

48. FALSE IMPRISONMENT—Sufficiency of Affidavit.—Where the statute confers on a magistrate the power to issue a warrant in a civil case on certain showing, the statute being in derogation of personal liberty, such showing is a condition precedent to the issuance of the warrant, and an arrest predicated on affidavit not containing the requisite showing is illegal, making the person obtaining the warrant liable as for false imprisonment.—STROZZI v. WINES, Nev., 57 Pac. Rep. 832.

49. FRAUDULENT CONVEYANCES—Actions to Set Aside.—A bill in equity to set aside deeds, alleging that the grantor thereby conveyed all of his property to his son, leaving nothing out of which complainant could make its debt, and that the deeds were not only without valuable consideration, but were executed with

intent to hinder, delay and defraud complainant, is sufficiently specific to put in issue whether the deeds were made with intent to defraud, and whether the grantee was privy to such fraud.—AMERICAN NET & TWINE CO. v. MAYO, Va., 33 S. E. Rep. 528.

50. GARNISHMENT—Liability of City as Garnishee.—Under Code, § 5, subsec. 13, providing that the word "person" may be applied to bodies politic and corporate, as well as individuals, Code, § 2967, providing that "any person" indebted to a non-resident may be summoned as a garnishee, includes municipal corporations.—PORTSMOUTH GAS CO. v. SANFORD, Va., 33 S. E. Rep. 516.

51. GUARANTY—Pleading—Statute of Frauds.—When, by the statute of frauds, a contract or promise valid at common law is rendered ineffectual to sustain a recovery thereon unless there be a writing, it is not necessary in a declaration upon such contract or promise to aver that the requisition of the statute that it should be in writing has been complied with. In a declaration against a surety or guarantor it is not necessary to state that the promise was in writing. The law presumes the fact that the promise was in writing, and what the law intends may be omitted in the averment of pleading.—WILKINSON-GADDIS CO. v. VAN RIPER, N. J., 43 Atl. Rep. 675.

52. HOMESTEAD — Devise — Rights of Surviving Children.—Under Gen. St. 1882, § 1998, providing that no right of homestead shall exist in any property, aliened by any person as against the title of the alienee, a husband to whom a homestead in lands owned by him in fee has been accorded during life may devise such lands, and vest in devisee a good title, as against the claim of homestead by his children.—BOSTICK v. CHOVIN, S. Car., 33 S. E. Rep. 508.

53. HOMESTEAD — Exemption — Sale for Purchase Money.—Laws 1890, ch. 86, which by express terms exempts a homestead from all process, levy, or sale, bestows on the owner immunity from a sale thereof for purchase money.—NORTHWESTERN LOAN & BANKING CO. v. JONASEN, S. Dak., 79 N. W. Rep. 840.

54. HOMESTEAD — Separate Property of Wife.—A homestead claim filed by a woman, and settled upon and improved for about four years prior to her marriage, is her separate property, though the patent was not acquired until after marriage.—FORKER v. HENRY, Wash., 57 Pac. Rep. 811.

55. HUSBAND AND WIFE — Wife's Separate Estate.—Property purchased by a married woman with money borrowed by her, though having no separate estate, becomes her separate property.—MAIN v. SCHOLL, Wash., 57 Pac. Rep. 800.

56. INJUNCTION — Preliminary Injunction — Restraining Interference with Contract.—The holder of a contract from a municipality giving it the right to receive and reduce all the garbage therefrom for a term of years, at a fixed charge therefor, on a showing that in compliance with such contract it has built a crematory at large expense, is entitled to a preliminary injunction against third parties, restraining them from collecting and removing garbage to other places, in violation of its contract rights, pending a hearing on its bill for the recovery of damages and for a permanent injunction.—SANITARY REDUCTION WORKS OF SAN FRANCISCO v. CALIFORNIA REDUCTION CO., U. S. C. C., N. D. (Cal.), 94 Fed. Rep. 698.

57. INTOXICATING LIQUORS — License Fee — Note.—A note given in payment of a liquor license which is invalid because not paid for in money is without consideration and void.—HENCKE v. STANDIFORD, Ark., 52 S. W. Rep. 1.

58. JUDGMENT—Assignment — Constructive Notice.—The filing of a written assignment of a judgment with the clerk of the court in which the judgment was rendered, and the entry of the same by the clerk upon the appearance docket of the court, do not constitute notice to others of the assignment.—MILLER v. BALTIMORE & O. R. CO., Ohio, 54 N. E. Rep. 869.

59. JUDGMENT — Collateral Attack — Appearance.—A judgment for divorce cannot be attacked collaterally in a suit by the wife against an administrator to declare her the heir of deceased.—SMITH v. SMITH, Colo., 57 Pac. Rep. 747.

60. JUDGMENTS—Power to Vacate after Allowing Execution.—The granting of an order allowing an execution to issue, under Code, § 3600, providing that any court, after the fifteenth day of its term, may make a general order allowing executions to issue on judgments and decrees after 10 days from their date, though the term at which they are rendered be not ended, does not make the judgment final, so as to deprive the court of the power of afterwards setting it aside.—BAKER v. SWINEFORD, Va., 33 S. E. Rep. 542.

61. JUDGMENT — Satisfaction. — Where a judgment debtor was financially embarrassed, and unable to pay the judgment, his payment of a portion and giving of additional security for another portion, aggregating less than the whole, were a sufficient consideration for the satisfaction of the judgment.—BROWN v. KERN, Wash., 57 Pac. Rep. 798.

62. JUDGMENT AS EVIDENCE—Authentication of Record.—A judgment of a federal court may be proved in another federal court by an exemplified copy of the record containing the judgment, under the seal of the court and authenticated by the certificate of the deputy clerk. Every federal court is presumed to know the seal of every other federal court, and it will also be presumed in favor of the certificate of the deputy that the clerk was absent when it was made.—NATIONAL ACC. SOC. v. SPIRO, U. S. C. C. of App., Second Circuit, 94 Fed. Rep. 750.

63. LANDLORD AND TENANT — Duty of Landlord to Third Persons.—The owner of a business block in which rooms and offices are let, owes no duty to a person injured while visiting tenants, to keep the hallways and stairways lighted, where they are in all respects inherently safe and convenient.—CAPEN v. HALL, R. I., 43 Atl. Rep. 847.

64. LANDLORD AND TENANT—Lien for Rent—Crops.—The purchaser of crops from a tenant is bound to take notice of the landlord's lien on them for rent due or to become due, as created by Horner's Rev. St. 1897, § 5224, and where the rent is payable out of a part of the crop, and one purchases the entire crop raised by the tenant and mixes it with like grain of his own, he is liable to the landlord for a conversion. — CAMPBELL v. BOWEN, Ind., 54 N. E. Rep. 409.

65. LIBEL—Exemplary Damages.—Exemplary damages may be allowed by the jury in an action of libel, when the publication was made with ill will, or a willful intent to injure the party libeled, and the matter published was false, libelous and unprivileged.—TIMES PUB. CO. v. CARLISLE, U. S. C. C. of App., Eighth Circuit, 94 Fed. Rep. 762.

66. LIFE INSURANCE—Contract—Suicide.—It is a term of every policy of life insurance, implied if not expressed, that the insured will not die by his own willful and deliberate act, and, therefore, if he does die by such act, his life is terminated by a risk against which the company has not insured; and the fact that the beneficiary is a person other than the insured himself cannot enlarge the scope of the contract, nor authorize a recovery thereon.—HOPKINS v. NORTHWESTERN LIFE ASSUR. CO., U. S. C. C. of App., E. D. (Pa.), 94 Fed. Rep. 729.

67. LIFE INSURANCE—Designation of Beneficiary.—The administrator of a beneficiary named in a certificate issued by a mutual benefit life insurance society is the proper person to whom the proceeds of the certificate should be paid, though the beneficiary died before insured, where the by-laws provide that the insured shall designate the beneficiary, and can change him at will, in writing on the certificate, where he fails to designate another beneficiary after the death of the one named.—THOMAS v. COCHRAN, Md., 43 Atl. Rep. 792.

68. MALICIOUS PROSECUTION.—Action for malicious prosecution will not be defeated on the ground that defendant was not connected with the prosecution, where the complaint on which the arrest was made was sworn to by an employee, who gave defendant's name as a witness, and defendant testified, and the letter preceding plaintiff's arrest, in which he was told to make immediate settlement on pain of much trouble and annoyance, was sent by defendant, and the attorney for the prosecution stated to plaintiff that he appeared for defendant.—GETTINGER v. MCRAE, Md., 43 Atl. Rep. 823.

69. MALICIOUS PROSECUTION—False Imprisonment.—In an action to recover for malicious prosecution, the plaintiff is not, under the allegations of a complaint alleging that he was arrested without probable cause, and maliciously prosecuted by defendant, and that he was acquitted of the charge, entitled to recover as for false imprisonment, though the proof thereof would be sufficient under proper allegations, as the two causes of action are inconsistent.—DAVIS v. PACIFIC TELEPHONE & TELEGRAPH CO., Cal., 57 Pac. Rep. 764.

70. MARRIED WOMAN—Note of Wife.—A wife's promissory note is forceful only when some beneficial consideration proceeds to her or to her estate.—BISHOP v. BOURGEOIS, N. J., 43 Atl. Rep. 655.

71. MASTER AND SERVANT—Dangerous Employment—Risk.—The employment of a carpenter to work on the roof of a building, over which were stretched electric wires by another than the employer, for the purpose of conveying power to a neigboring building, the lowest of which was four feet above the roof, and the presence of which were known to the employee, does not impose any duty upon the employer to give warning to the employee of the danger of contact with said wires, nor render him liable in case of injury to the employee through contact therewith.—OWINGS v. MONEYNICK OIL MILL, S. Car., 33 S. E. Rep. 511.

72. MASTER AND SERVANT—Injuries to Brakeman—Assumption of Risk.—A brakeman does not assume the danger of being tripped by a sliver detached from a rail, as a risk incident to his employment of coupling cars, unless he had knowledge of its existence, or could have known of it by the exercise of due care.—SAN ANTONIO & A. P. RY. CO. v. WILLIAMS, Tex., 52 S. W. Rep. 89.

73. MASTER AND SERVANT—Negligence—Injury to Employee.—A master, charged with the duty to use reasonable care that overhead shafting in a factory shall be supported and maintained so as not to endanger the safety of servants working underneath it, cannot escape liability for breach of that duty by delegating its performance to an engineer placed in charge of the machinery in the factory.—HUSTIS v. J. A. BANISTER CO., N. J., 43 Atl. Rep. 651.

74. MASTER AND SERVANT—Personal Injury—Joinder of Defendants.—Although a master and his servant, through whose culpable negligence another is injured, may each be liable for such injury, their obligations rest upon different grounds, and they cannot be held jointly liable.—DOREMUS v. ROOT, U. S. C. C., D. (Wash.), 94 Fed. Rep. 760.

75. MORTGAGES — Agreement for Extension — Foreclosure.—An agreement between mortgagor and mortgagee, after condition broken, that the time for making payment might be deferred, but not for any definite time, will not defeat the right of entry given by the terms of the mortgage, nor bar proceedings for foreclosure.—HASELTON v. FLORENTINE MARBLE CO., U. S. C. C., D. (Vt.), 94 Fed. Rep. 701.

76. MORTGAGE — Defense of Duress. — Proof that a note and mortgage by a wife upon her individual property were executed under threats of criminal prosecution of her husband for embezzlement, and that she was greatly excited and alarmed at these threats, and had fainting spells before and after she executed the mortgage, and only consented to execute it to prevent her husband being sent to jail, is sufficient evidence of duress to invalidate the note and mortgage as between the wife and the mortgagee.—MACK v. PRANG, Wis., 79 N. W. Rep. 770.

77. MORTGAGES — Injury to Mortgaged Property.—A mortgagee may maintain an action at law for an injury wrongfully done to the mortgaged property, whereby its value is lessened, and his security impaired, provided he sustains an actual loss thereby, and the measure of his recovery is the amount of such loss.—HUBINGER v. CENTRAL TRUST CO. OF NEW YORK, U. S. C. C. of App., Eighth Circuit, 94 Fed. Rep. 788.

78. MORTGAGES—Priority—Record.—Since a judgment lien on lands binds only the interest which the debtor actually has therein, an unrecorded mortgage takes precedence over a subsequent judgment; a judgment creditor not being a *bona fide* purchaser, within 1 Ballinger's Ann. Codes & St. § 4535, providing that mortgages shall be valid against *bona fide* purchasers from the time of their recording.—DAWSON v. MCCARTY, Wash., 57 Pac. Rep. 816.

79. MORTGAGES—Sales—Vacation.—A sale to a third person under a trust deed will not be set aside on the ground of accident and surprise consisting simply of a failure of the debtor to raise the money necessary to redeem within the time limited, through being unable to find the person who had agreed to loan him the money, especially where the debtor made no attempt to get the money until three days before the sale.—DUNN v. MCCOY, Mo., 52 S. W. Rep. 21.

80. MUNICIPAL BONDS — Action—Pleading.—In an action upon an obligation of a municipal corporation, issued by special agents, facts must be averred which show the authority of such agents; but, when the obligation is issued by the corporation or its general agents, no such averments are essential.—BOARD OF EDUCATION OF RIDGEFIELD TP. v. BOARD OF EDUCATION OF BOROUGH OF CLIFFSIDE PARK, N. J., 43 Atl. Rep. 722.

81. MUNICIPAL CORPORATIONS—Acceptance of Streets Dedicated.—The acceptance by a city of a platted street can be implied from proof showing that the city improved and exercised control over it.—CITY OF DURANGO v. DAVIS, Colo., 57 Pac. Rep. 733.

82. MUNICIPAL CORPORATIONS — Implied Contracts with Councilmen.—The city of Santa Rosa is not liable to an officer and councilman thereof on an implied contract to pay for merchandise received from him, in view of Pol. Code, § 920, and charter of Santa Rosa, prohibiting councilmen from being interested in "any contract" made by them, and page 257 of the charter, authorizing the council to allow claims, and Pen. Code, § 71, making it a crime for a councilman to be interested in a contract with the city.—BERKA v. WOODWARD, Cal., 57 Pac. Rep. 777.

83. MUNICIPAL CORPORATION — License — Traveling Venders of Drugs.—A town ordinance requiring traveling venders of drugs and nostrums, who accompany the offer of their goods for sale with public exhibitions in the streets, to pay a license fee of $50 a day, is not invalid, as being unreasonable and extortionate.—CITY OF WALLA WALLA v. FERDON, Wash., 57 Pac. Rep. 796.

84. MUNICIPAL CORPORATION—Negligence—Defective Sidewalks.—A city is not liable for personal injuries caused by a pedestrian's tripping on a railing that an owner of an adjoining lot had erected at the outer edge of a sidewalk, where the sidewalk itself was unobstructed, and of sufficient width to accommodate the travelers in the locality in which it was constructed.—OLIVER v. CITY OF DENVER, Colo., 57 Pac. Rep. 729.

85. MUNICIPAL CORPORATIONS—Street Railroads—Constitutional Limitations.—Under Const. art. 14, § 9, providing that "the State shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work," works of internal improvement, which the State itself is prohibited from undertaking, it cannot authorize municipalities to undertake or become interested in.—ATTORNEY GENERAL v. PINGREE, Mich., 79 N. W. Rep. 814.

86. NATIONAL BANKS—Insolvency—Trust Funds.—A national bank received funds of a school district which it had no right to receive as an ordinary deposit, or to mingle with its own funds, and which it undertook to hold for the special purpose of paying certain bonds of the school district, and no other. It did in fact mingle the funds with its own, and became insolvent, none of the bonds having been presented for payment. It had on hand, at the time it suspended business, cash in excess of the amount of such deposit, which came into the hands of its receiver. Held, that such deposit constituted a trust fund, which was recoverable by the school district from the receiver; the presumption being that so much of the cash on hand as equaled the deposit was the money of the school district.—MERCHANTS' NAT. BANK OF HELENA, MONT., V. SCHOOL DIST. NO. 8, OF MEAGHER COUNTY, MONT., U. S. C. C. of App., Ninth Circuit, 94 Fed. Rep. 705.

87. NEGLIGENCE—Electric Wires.—One who uses, controls and manages an electric current of high destructive power, in a place where it is reasonably probable that others must enter to work, owes to each person who so enters a duty to use reasonable care to maintain a proper insulation of such current.—ANDERSON V. JERSEY CITY ELEC. LIGHT CO., N. J., 43 Atl. Rep. 654.

88. NEGLIGENCE — Evidence — Res Gestæ — Declarations after Injury.—A statement by the motorman of the defendant company that it was due to his (the motorman's) own carelessness that plaintiff got hurt, made after the injury was complete, and plaintiff had been removed from where he had fallen, and was sitting in the car, and made with the obvious purpose of showing that the motorman was guilty of no intentional wrong, is no part of the res gestæ, and is inadmissible.—LITTLE ROCK TRACTION & ELEC. CO. V. NELSON, Ark., 52 S. W. Rep. 7.

89. NOTES—Extension of Time of Payment—Consideration.—The promise of a holder of a note to extend it after maturity for a definite period, where based on no other consideration than the promise of the maker to keep the money during that period, and pay interest according to the note, is not based on a valid consideration, so as to discharge a surety on the note.—HARBURG V. KUMPF, Mo., 52 S. W. Rep. 19.

90. PARTNERSHIP—Incorporation.—Where a partnership incorporates, and the company continues to use the firm books, and continues the various running accounts without break, it is estopped to set up the incorporation as a defense against one who, without notice of the change, sells its goods, and charges them to the firm.—REID V. F. W. KRELING'S SONS' CO., Cal., 57 Pac. Rep. 773.

91. PARTNERSHIP—Relation as to Third Parties—Mercantile Agency.—Where a mercantile agency, in behalf of a subscriber, obtained statements from the person inquired about that he was a partner in a certain firm, and such statements were sent to the subscriber, who relied thereon, and extended credit to the firm, a jury is warranted in finding him liable as a partner.—ELLISON V. STUART, Del., 43 Atl. Rep. 886.

92. PARTNERSHIP — Suits Between Partners. — One partner cannot maintain an action at law against the other to recover a balance claimed to be due him growing out of the business until there has been a settlement thereof, his only remedy being by a suit in equity for an accounting.—ROBINSON V. COMPHER, Colo., 57 Pac. Rep. 754.

93. PARTY WALLS — Covenants Running With the Land.—A party wall agreement, under which the first party is given the right to build the wall at his own expense, the second party to pay one-half the cost when he builds, and on such payment the parties to become joint owners, and which expressly provides that the contract shall be a perpetual covenant, binding on the parties, their heirs and assigns, creates covenants running with the land; and the successor in title of the first party is entitled to the payment made on the use of the wall by the second party or his assigns.—NOBLE V. KENDALL, Mich., 79 N. W. Rep. 810.

94. PLEDGE—Parol Evidence to Vary Contract.—Where the owner of horses kept at a livery stable relinquished in writing all claim on them to the livery man until his bill for their board was paid in weekly installments, a contemporaneous agreement in parol that he was to go on using them in the ordinary course of business could not be proved under the guise of showing what the consideration was.—RADIGAN V. JOHNSON, Mass., 54 N. E. Rep. 858.

95. PRINCIPAL AND SURETY—Independent Contract Between Principals.—To discharge a surety from liability because of a variation in the contract without his consent, it is indispensable that the variation be in the terms of the contract by which the surety is bound. He will not be discharged by an independent contract between the principal parties, though it may be contemporaneous and relate to the same subject, without varying the terms of the contract of the surety.—STUTS V. STRAYER, Ohio, 54 N. E. Rep. 868.

96. PUBLIC LANDS—Control of Disposition—Powers of Congress.—The paramount control over the disposition of the public lands of the United States remains in congress, and the fact that a contest over the right of entry of such lands is pending before the land department, a creation of congress, and not of the constitution, does not deprive congress of such paramount control, and it may at any time, by an act passed for that purpose, withdraw such contest from the jurisdiction of the department and itself determine the rights of the parties.—EMBLEN V. LINCOLN LAND CO., U. S. C. C., D. (Neb.), 94 Fed. Rep. 710.

97. PUBLIC LAND—Streams—Appropriation.—In 1877 a settler on public lands of the United States had a right, created by custom, to acquire by appropriation the exclusive right to the use of waters of a stream, necessary for the irrigation of his land for a useful purpose, to the exclusion of a subsequent settler of land further up the stream.—OFFIELD V. ISH, Wash., 57 Pac. Rep. 809.

98. RAILROAD COMPANY—Killing of Stock.—Where an animal trespassing on a railway track is in such position as to be invisible to the engineer of an approaching train until so close that the train cannot be stopped before striking it, and it will endanger the lives of passengers to strike it at a reduced speed, it is not want of ordinary care for the engineer to maintain his speed.—DENVER & R. G. R. CO. V. DIVELBISS, Colo., 57 Pac. Rep. 743.

99. RAILROAD COMPANY — Liability for Injury —Receiver.—A railroad company is not liable for a personal injury which occurred on its road while in control of a receiver appointed by a federal court, it not appearing that the receiver had made betterments respecting the company's property, or that the company had assumed, or the court decreed, liability for the injury.—MISSOURI, K. & T. RY. CO. V. WOOD, Tex., 52 S. W. Rep. 93.

100. RAILROAD COMPANY—Negligence. — Whether a boy who, in crossing a railroad, in attempting to avoid a collision with an engine on one track, steps onto another without looking, and is struck by detached cars, which are approaching without warning, is negligent, is for the jury.—STEELE V. NORTHERN PAC. RY. CO., Wash., 57 Pac. Rep. 820.

101. REFORMATION OF INSURANCE POLICY.—A court of equity may reform a contract of insurance, and at the same time enforce it as reformed, by administering full relief by a decree of payment of loss, when the evidence of the extent is satisfactory.—MARYLAND HOME FIRE INS. CO. V. KIMMELL, Md., 43 Atl. Rep. 764.

102. RELEASE AND DISCHARGE — Compromise —Mistake.—Where a woman is injured in jumping from a car, the fact that she is pregnant at the time is merely a condition bearing on the probable effect of the injury; and accordingly a mutual mistake as to that fact is not sufficient to set aside a compromise of her

claim for damages, she having had a miscarriage, after the release was executed, as a result of the injury.—KOWALKE V. MILWAUKEE ELEC. RY. & LIGHT CO., Wis , 79 N. W. Rep. 762.

103. RELEASE AND DISCHARGE—Parol Agreement.—Where parties settled an alleged cause of action purporting to reduce their settlement to writing, wherein the injured party fully released and discharged the other in consideration of a sum acknowledged therein to be paid, the party injured cannot show a contemporaneous parol agreement to pay a further consideration, without impeaching the settlement for fraud or mistake.—JACKOWSKI V. ILLINOIS STEEL CO., Wis., 79 N. W. Rep. 757.

104. SUNDAY CONTRACT—Validity as to Third Parties.—A debtor cannot defeat the collection of a valid debt by an assignee, on the ground that it was sold and assigned to him on Sunday, in violation of the laws of the State, where the transfer was subsequently ratified by the assignor, and became binding between the parties to it; and such ratification renders it valid from the date of the actual assignment for the purpose of an attachment thereon procured by the assignee on that day.—TENNENT-STRIBLING SHOE CO. V. ROPER, U. S. C. C. of App., Fifth Circuit, 94 Fed. Rep. 739.

105. TAXATION—Exemptions—Religious Associations.—Real property, title to which is held absolutely in fee by a bishop of the Roman Catholic church in accordance with its law, is not owned in the sense of Rev. St. § 1038, subd. 3, exempting from taxation property "owned by any religious association."—KATZER V. CITY OF MILWAUKEE, Wis., 79 N. W. Rep. 745.

106. TAXATION—Validity of Title.—A valid decree, obtained by proper proceedings in a court of competent jurisdiction, setting aside illegal town taxes, and not appealed from, will prevail, as against a subsequent decree obtained by the auditor general for the sale of the land for said taxes.—THOMAS V. MOORE, Mich., 79 N. W. Rep. 812.

107. TRIAL—Trustees—Bonds—Liabilities. — Where a corporation issued bonds secured by a deed to a trust company, the deed providing that the trusts were accepted upon the express condition that the trustee should incur no liability for anything other than the willful breach by it of the trusts created by the mortgage, and should certify the bonds when sold, the company, on certification of the bonds to be of a certain series secured by mortgage, merely identifies the bonds, but assumes no liability to purchasers except for a breach of the trust.—BAUERNSCHMIDT V. MARYLAND TRUST CO., Md., 43 Atl. Rep. 790.

108. TRUST—Executors and Administrators—Right to Follow Trust Company.—Where a trust fund is deposited in a bank to the trustee's individual credit, the *cestui que trust* need not prove that the identical money is on deposit, in order to obtain it from the trustee's administrator. It will be sufficient to show that the truet funds were deposited there by the trustee, and that so much money was still to his credit in the bank.—WULBERN V. TIMMONS, S. Car., 33 S. E. Rep. 568.

109. VENDOR AND PURCHASER—Contract—Conflict of Laws.—Where one living in England mailed an offer to parties in Maryland to purchase of them real estate situate in that State, and they mailed their acceptance in Maryland, but no place of payment was designated, the law of Maryland governs, although the agreement required the deeds, when executed, to be submitted to the purchase, in England, for his approval.—LATROBE V. WINANS, Md., 43 Atl. Rep. 829.

110. VENDOR AND PURCHASER — Contracts —Installments.—A land contract providing for payment in installments, and that the agreement shall be void on default of any payment, means that it is to be void at the option of the vendor.—MEAGHER V. HOYLE, Mass., 54 N. E. Rep. 847.

111. VENDOR AND PURCHASER—Subvendees — Limitations.—The bringing of an action of trespass to try title does not stop the running of limitations against the right of plaintiffs, the heirs of a subvendee, to pay the balance of the purchase price owing by the vendee, and thus obtain title to the land, though the original vendor had foreclosed his vendor's lien, he not having made the heirs parties thereto.—ROBINSON V. THOMPSON, Tex., 52 S. W. Rep. 117.

112. WASTE BY LIFE TENANT.—Where, owing to the growth of business interests, residence property became valueless for that purpose, and incapable of any use as business property in the condition in which it was, a life tenant was not guilty of waste in removing the dwelling house standing thereon 30 to 40 feet above the street, and in cutting the lot down to grade, so as to make it useful for business, and enhancing its value.—MELMS V. PABST BREWING CO., Wis., 79 N. W. Rep. 738.

113. WATERS—Navigable Waters—Riparian Rights.—A lessee of property bounded by a navigable stream takes to the center of the stream, subject to public easement, unless the lease shows a different intent.—BALLANCE V. CITY OF PEORIA, Ill., 54 N. E. Rep. 428.

114. WATER AND WATER COURSES — Use by Municipal Corporation.—A deed from a riparian owner to a city, conveying so much of the water in a stream "as flows by, along, across, or upon the lands" of the grantor, and stating the intent to be to grant to the city, in perpetuity, the full and unrestricted control of such stream, "for the purpose of mantaining a pure water supply for the use of the inhabitants of the city of Baltimore," does not limit the city to the appropriation of water for the use of its inhabitants only, but permits the sale of water for manufacturing and other purposes to inhabitants of the county outside the city limits.—MAYOR, ETC. OF BALTIMORE V. DAY, Md., 43 Atl. Rep. 798.

115. WILL—Bequest to Unincorporated Church.—A bequest in trust to a church, to use and apply the income therefrom for church purposes, will be upheld, and a trustee appointed to administer the trust, though such church at the time of the death of the testator and at the time of the probate of the will was an unincorporated body.—ST. PETER'S CHURCH V. BROWN, R. I., 43 Atl. Rep. 642.

116. WILLS — Construction — After Born Children.—Where a testator devises his estate to his wife, but directs that she shall hold it only until the youngest of his children, if any are born, shall attain 21 years of age, without directing that it shall then go to the children, or making any disposition of it, the court will supply the omission, that being clearly the testator's intention, and construe the will as a devise to the children on majority of the youngest.—IN RE DONGES' ESTATE, Wis., 79 N. W. Rep. 786.

117. WILLS—Construction — Intestacy. — Where the words of a residuary devise plainly pass a fee, other language in the will will not be construed to impute to the testator an intent to die intestate of the residue, if such construction can be avoided. Presumptions in such case should favor a construction that the testator intended to die testate, rather than intestate.—CARTER V. GRAY, N. J., 43 Atl. Rep. 711.

118. WILLS—Devises—Precatory Trusts.—A devise of "all the rest and residue of my property to my dear wife, believing that she will manage it judiciously, and perfectly satisfied that she will make a fair distribution of it among our children at her death," conveys an absolute title in the residue of the real estate, the words not being precatory in their nature.—CHESTON V. CHESTON, Md., 43 Atl. Rep. 768.

119. WITNESSES — Transactions With Decedent. — Comp. Laws, § 5260, provides that no person shall be excluded as a witness, except (subdivision 2) that, in actions by or against executors, etc., neither party shall be allowed to testify against the other as to any transaction with, or statement of, deceased, etc. Held, that the word "party" is used technically, and it does not disqualify a witness that he is interested in the result.—WITTE V. KOEPPEN, S. Dak., 79 N. W. Rep. 831.